IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1967~~ 1968

No. ~~1209~~ 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

APPENDIX

BARNABAS F. SEARS,
WAYLAND B. CEDARQUIST,
MAURICE J. McCARTHY,
33 N. LaSalle Street,
Chicago, Illinois 60602,
Attorneys for Petitioner.

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3966

INDEX TO APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. McCARTHY,
Defendant.

No. 66 CR 209

PREFIX TO RECORD

1. Suit was commenced by return of an indictment consisting of three Counts on April 1, 1966, entitled as above, and naming William J. McCarthy as the sole defendant.

2. On April 14, 1966, the defendant pleaded not guilty to each Count, and a trial date was set.

3. On July 15, 1966, the defendant withdrew his plea of not guilty to Count II of the indictment and entered a plea of guilty thereto. On Motion of the Government, Counts I and III were dismissed. The cause was referred to the Probation Office for Pre-Sentence Investigation.

4. On September 14, 1966, the Court entered its judgment and sentence.

5. On September 23, 1966, the defendant filed a Notice of Appeal.

2 INDICTMENT

(Caption omitted in printing)

Count One.

The March 1966 Grand Jury charges:

That on or about the 14th day of April 1960, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William J. McCarthy, defendant, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1959, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Illinois, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $15,256.27 and that the amount of tax due and owing thereon was the sum of $3,696.88, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $18,075.35, upon which said taxable income he owed to the United States of America an income tax of $4,625.62; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

3 *Count Two.*

The March 1966 Grand Jury further charges:

That on or about the 29th day of March, 1961, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William J. McCarthy, defendant, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1960, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Illinois, a false and fraudulent income tax return

wherein he stated that his taxable income for said calendar year was the sum of $16,804.59 and that the amount of tax due and owing thereon was the sum of $4,193.56, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $29,738.85, upon which said taxable income he owed to the United States of America an income tax of $9,337.26; in violation of Section 7201, Internal Revenue Code: Title 26, United States Code, Section 7201.

4

Count Three.

The March 1966 Grand Jury further charges:

That on or about the 13th day of April, 1962, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William J. McCarthy, defendant, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1961, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Illinois, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $2,784.27 and that the amount of tax due and owing thereon was the sum of $556.85, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $8,322.96, upon which said taxable income he owed to the United States of America an income tax of $1,763.97; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

A True Bill:

/s/ Oliver Blackinton

Foreman

/s/ Edward V. Hanrahan

United States Attorney

49 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on April 14, 1966, at 10:00 o'clock, a.m.

Present:

Hon. Edward V. Hanrahan,
United States Attorney
By: Mr. Robert A. Galbraith,
on behalf of the Government;
Mr. Bernard H. Sokol,
on behalf of the Defendant.

50 The Clerk: 66 CR 209, United States v. William McCarthy, arraignment and plea.

Mr. Sokol: We will waive reading of the indictment. I haven't yet received a copy of it.

The Court: You had better not waive reading it until you have received a copy.

Mr. Sokol: I now acknowledge having received it and we will, in behalf of the defendant, enter a plea of not guilty, if the Court please.

Mr. Galbraith: Your Honor, for your information, this is a three-count indictment charging the evasion of income taxes for calendar years 1959, '60 and '61.

The Court: How soon will you be ready for trial?

Mr. Sokol: I don't contemplate any preliminary motions because I have already had some discussions with Mr. Galbraith, so I have an idea of what amounts are involved. Perhaps June?

The Court: All right, I had June in mind. June 13th?

Mr. Sokol: 13th is fine.

The Court: That is on a Monday and not a Friday.

51 Mr. Sokol: Fine. Thank you, your Honor.

(Which were all the proceedings had and taken in the above-entitled cause on the day and date aforesaid).

52 Certificate of Official Court Reporter.

53 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 29, 1966, at 10:00 a.m.

Present:

Hon. Edward V. Hanrahan,
United States Attorney,
By: Mr. Robert A. Galbraith,
on behalf of the Government.

54 The Clerk: 66 CR 209, U.S. v. William J. McCarthy, motion of the Government to reset trial date from June 30 to July 15th.

Mr. Galbraith: Good morning, your Honor. This is the matter that I discussed with you the other day and it arises out of the defendant's illness. This is an income tax case.

The Court: How long will the trial take?

Mr. Galbraith: Well, it is anticipated the matter will not go to trial, according to counsel.

The Court: When is it set for?

Mr. Galbraith: It is presently set for tomorrow. We are asking it to be set July 15th.

The Court: That will be the order.

(Which were all the proceedings had and taken in the above-entitled cause on the day and date aforesaid.)

55 Certificate of Official Court Reporter.

38 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois on Friday, July 15, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,
By: Mr. Patrick J. Hughes,
Assistant United States District Attorney,
on behalf of the government;
Mr. Bernard Sokol,
on behalf of the defendant.

39 The Clerk: 66 CR 209, U.S.A. vs. William J. McCarthy, trial.

Mr. Sokol: Good morning, your Honor. This matter was set over because of my inability to appear.

The Court: What case is this? I don't even know.

Mr. Sokol: This is United States vs. William J. McCarthy, 66 CR 209, a tax fraud case.

The Court: It was set over for arraignment or what?

Mr. Sokol: No, set over for trial. At arraignment, a plea of not guilty was entered to all three Counts. Mr. Galbraith then appeared for the United States. Mr. Hughes now appears today.

If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

40 The Court: Is that satisfactory to the government?

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant McCarthy: Yes, your Honor.

41 The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant McCarthy: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of $10,000?

Defendant McCarthy: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant McCarthy: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

42 Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant McCarthy: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

Defendant McCarthy: I beg your pardon?

The Court: Has anybody threatened you to enter a plea of guilty?

Defendant McCarthy: That's right, of my own volition, your Honor.

The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand.

Mr. Sokol: Thank you very much.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

43 Certificate of Official Court Reporter.

24 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Wednesday, September 14, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,
By: Mr. Robert A. Galbraith,
Assistant United States District Attorney;
on behalf of the government;

Sokol, Schwab & Angram,
By: Mr. Bernard A. Sokol,
on behalf of the defendant;
Probation Officer Joseph Sanculius

25 The Clerk: 66 CR 209, United States vs. William J. McCarthy, disposition report on Count 2.

Mr. Galbraith: Good morning, your Honor.

The Court: Mr. McCarthy, do you have anything to say prior to the time that sentence is imposed?

Defendant McCarthy: I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry.

The Court: And you, Mr. Sokol, on his behalf, have you something to say?

Mr. Sokol: Only this, if the Court please; I am quite aware of the fact that there has been a very thorough pre-sentence investigation made in this case. I talked to the probation officer and we have been given an opportunity to submit a good deal of ma-

terial to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—
26 I don't know truly what I could add except to indicate that he is completely contrite.

The Court: And you, Mr. Galbraith?

Mr. Galbraith: Your Honor, only to this extent, as you probably recall, this was originally a three Count indictment in which the government moved to dismiss Counts 1 and 3 at the time that the defendant pled to Count 2. The prime consideration of that was an understanding between the parties that all taxes, penalties and interest would be paid and I just would ask your Honor if you would incorporate some reference to that in the disposition of the matter.

Mr. Sokol: There has never been any disposition to avoid such a consequence.

The Court: I mean, the report indicates that he has ample assets for the government to attach, much in excess of the amount of owed taxes.

Well, I think that with the amount involved here that the deterrent effect of a sentence is desirable. Because of that, the defendant will be sentenced to the custody of the Attorney General for one year and fined $2,500.

Mr. Sokol: Your Honor, may I please ask that
27 the sentence itself be suspended? I would like to, if I may, be heard.

The Court: I will be happy to hear you.

Mr. Sokol: Thank you.

If the Court please, apart from the wrecking of his physical health that has attended a number of the

problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs no deterrent. I cannot imagine a man—apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

When I spoke with Mr. Sanculius, I knew that we had given to him some reference to the fact and some
28 attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

Mr. Sokol: I am sorry, your Honor, I did not hear the beginning.

The Court: I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion the manner in which the books were kept was not inadvertent.

Mr. Sokol: Your Honor, it had no reference to taxation. I would like to be heard on that, because we went into this in considerable detail.

When a man is neglectful and adopts a kind of a devious way of secreting himself from the govern-
29 ment, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this—he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that time he had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks. His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, "You have to put yourself under the jurisdiction of your brother," and there was some indication that he was supposed to deposit this and he would not have disposition over his own assets. They did not feel that he could look out for
30 himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps guess without going into Freudian terms he was oppressed, and in order to free himself—and this had nothing to do with the

government—in order to free himself from what he felt was a trap situation where he, at the age of sixty-two or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has—and it is like a little boy—if he has the consequence lying before him he says, "Oh, yes."

In other words, he does not run away if he is faced with it, but that he himself be guided there.

Your Honor, at the age of sixty-five, particularly
31 with this kind of situation, I am positive with all of the help that he has sought and with the—he is actually now—he is no longer his own prisoner, but he is, I think, very, very much confined in terms of the kinds of help he has sought out and I would most entreat your Honor to give him an opportunity to prove to himself as well as to the Court that the remaining years of his life can be acted out in an adult fashion rather than in the little boy behavior that has tended so much of his conduct.

The Court: I mean, if you are still a little boy at the age of sixty-six, why, there is not much time to prove whether you can become an adult.

Mr. Sokol: Your Honor, there is always something to save. If I were ninety years old and they told me I had ten days left, I would want to make those ten days something healthy rather than something sick.

The Court: Anything further?

Mr. Sokol: No, your Honor.

Officer Sanculius: Your Honor, may I say a word.

The Court: Yes, Officer.

Officer Sanculius: Your Honor, I just wondered
32 whether you had received the additional—

The Court: Even if he had not got that pardon anything that happened that long ago has no bearing on what I have done.

Officer Sanculius: The other thing I had in mind, your Honor, is that I have verification that he has been attending the AA group for the past two months and his sponsor is here in Court to verify that if necessary.

The Court: Well, I assume that is unquestionably true. I have known people to get in and out of that club, you know, about every six months. They become a member and cease to be a member and then they become a member.

Mr. Sokol: Your Honor, could your Honor please entertain my motion and try him, please? I am sure that perhaps he can indicate to the Court how much he wants to make good.

The Court: I am sure that he does. Everybody that is confronted with what he is confronted with here has that desire. I feel certain that that is the fact. However, I think that having—

Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of
33 what can best be described as gross neglect, and criminal neglect, if you please.

I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took place over a series of four years, didn't it, Counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel
34 in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accomplie.

There is no aspect of his existence right now where he has not said, "I am wrong and I need guidance and I will do what somebody else says."

So whether it relates to the matter of drinking, he is with AA; if it relates to the matter of religious discipline, he has put himself very, very closely on a day to day and week to week responsibility arrangement.

Mrs. McCarthy is here and can testify to the fact that the idea of accountability is very, very much more in his picture.

The big thing, I think, is that so far as accountability to his government is concerned, that before this indictment took place, he had already put him-

self into Mr. Angram's hands. It was through Mr. Angram that a number of these things were crystallized, and they were submitted.

The Court: All right, the sentence heretofore entered is not vacated; a year in the custody of the Attorney General and $2,500 fine.

35 Mr. Sokol: May we have a stay of execution for ten days, if the Court please.

The Court: Execution for ten days.

The Marshal: He is to surrender to the Marshal at noon on the tenth day?

The Court: Surrender to the Marshal on the 26th day of September at noon.

Defendant McCarthy: Your Honor, could I make a little statement, please.

The Court: What? I cannot hear you.

Defendant McCarthy: I'm handling the printing of the ballots for the County at the moment. It is going into the hands of Mr. Barrett and will take at least fifteen days. I handle it myself personally and it will take fifteen days to complete it.

The Court: I will extend the stay of execution until noon on the 30th of September, which is sixteen days. Noon on the 30th of September you are to surrender to the Marshal.

(Which were all of the proceedings taken and had in the above-entitled cause on the above-mentioned date.)

36 Certificate of Official Court Reporter.

18 JUDGMENT AND COMMITMENT ORDER, entered September 14, 1966:

On this 14th day of September, 1966 came the attorney for the government and the defendant appeared in person and by Counsel.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of Income Tax Evasion in violation of Section 7201, Internal Revenue Code; Title 26, United States Code Section 7201 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year.

It Is Further Ordered and Adjudged that the defendant forfeit and pay to the United States of America a fine in the sum of Two Thousand Five Hundred Dollars ($2,500.00) and costs.

On motion of defendant, execution stayed until September 30, 1966 at 12 o'clock noon and defendant's bond to stand.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ R. B. Austin
United States District Judge

20 NOTICE OF APPEAL, filed September 23, 1966:

Name and Address of Appellant:

William J. McCarthy
6245 North Lemont Avenue
Chicago, Illinois

Name and Address of Appellant's Attorney:

Maurice J. McCarthy
Boodell, Sears, Foster, Sugrue & Crowley
33 North LaSalle Street
Chicago, Illinois 60602

Offense:

Violation: Section 7201, Title 26, United States Code; Willful attempt to evade or defeat any tax imposed by Title 26, United States Code.

Concise Statement of Judgment or Sentence and Date thereof:

Appellant sentenced to custody of Attorney General for a period of one year and fined the sum of $2500.00, September 14, 1966.

Name of Prison Where Now Confined, If Not On Bail:

Appellant at large on Bond.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the above mentioned judgment.

/s/ William J. McCarthy
/s/ Boodell, Sears, Foster,
Sugrue & Crowley

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 15929 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
WILLIAM J. McCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 10, 1968

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* William J. McCarthy, defendant, has appealed from a judgment of the district court, convicting him, on his plea of guilty, of a violation of § 7201 of the Internal Revenue Code (26 U.S.C. § 7201), as charged in an indictment, upon which he was given a prison sentence of one year and ordered to pay a fine of $2500 and costs.

The first question raised here is whether the plea of guilty was accepted in accordance with rule 11 of the Federal Rules of Criminal Procedure,[1] and the second is whether the court abused its discretion in entering

[1] 18 U.S.C.A. Rule 11, which provides:
A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining

judgment after it allegedly knew or should have known that defendant did not understand the nature of the charge. Lastly an issue is raised as to whether the court denied defendant his rights under the fifth and sixth amendments to the constitution, by entering judgment without any basis for a determination that the defendant understood the nature of the charge.

The grand jury, in count II, charged that defendant wilfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him for the calendar year 1960, by filing and causing to be filed a false and fraudulent income tax return stating his taxable income was $16,804.59 and the tax due was $4,193.56, whereas, as he then and there well knew, they were $29,738.85 and $9,337.26, respectively, in violation of said § 7201.

On April 14, 1966, government attorney Galbraith and attorney Sokol, representing defendant, together with defendant, appeared in court and a plea of not guilty was entered. The cause was then set for trial on June 13, 1966.[2]

When the case was called for trial on July 15, 1966, there were present defendant's counsel Sokol and government attorney Hughes, as well as defendant. The following proceedings then occurred:

> Mr. Sokol: * * * If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.
>
> The Court: Is that satisfactory to the government?

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[1] (Continued)
that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

[2] A succession of postponements was thereafter ordered including a setting for trial on July 15, 1966.

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of $10,000?

Defendant: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, perists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

• • • • •

Defendant: That's right, of my own volition, your Honor.

The Court: All right. Enter a pretrial investigation order and continue the matter until the 14th day of September. Same bond may stand.

On September 14, 1966, the case was called for disposition and the court asked defendant personally if he had "anything to say prior to the time that sentence is imposed?" He asked a similar question of defense counsel. The court heard their answers. Sentence was then imposed. The court also stayed execution for sixteen days.

1. Defendant's counsel urge that, because of three changes made in rule 11, Federal Rules of Criminal Procedure, *effective July 1, 1966,* the conviction of defendant on his plea of guilty herein should be reversed. First, they say that a judge is now *required* to address the defendant *personally.* Secondly, they say a judge is now required to "determine from his personal interrogation of defendant that he understands the consequences of the plea", and thirdly the court must determine that there is a factual basis for the plea. However, it is clear the district judge in this case had these recent changes in mind, as the contents of his remarks and questions to defendant indicated.

Counsel for appellant urge that defendant did not understand the nature of the charge against him. They base this upon defendant's own statement to the district judge when he was asked if he had anything to say prior to the imposing of sentence. The record shows that defendant then said:

"I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry."

They also rely on the fact that the probation officer informed the court that "defendant had become a member of Alcoholics Anonymous at approximately the time the guilty plea was entered" and that the court was also informed that defendant "is 66 years of age, who had been hospitalized at one time for alcoholism".

However, a complete answer to this contention is that the offense involved here refers to the filing of defendant's income tax return for the year 1960, which occurred on March 19, 1961, or about five years before sentencing which did not occur until 1966. On this appeal the critical date as to defendant's physical and mental being was July 15, 1966 when his plea of guilty was entered—not some five and a half years before sentencing.

Under these facts, we hold that the district court satisfied the requirements of rule 11 in effect on and after July 1, 1966, in accepting defendant's plea of guilty. *Cf. United States* v. *Rizzo,* 7 Cir., 362 F. 2d 97, 99 (1966); and *United States* v. *Lowe,* 7 Cir., 367 F. 2d 44, 45 (1966). While these cases involved sentencing before July 1, 1966, we find their reasoning in substantial accord with the result we now reach in this case.

2. Next, defendant's counsel contend that the charges made against defendant were complicated and may well have been confused by defendant with lesser included offenses within § 7201, inasmuch as count II of the indictment charged violation of § 7201 of the Internal Revenue Code, by the filing of a "false and fraudulent income tax return". Defendant's counsel insist that such an allegation is undoubtedly quite common, since such an allegation would also form the basis for a violation of § 7207, which would amount to a misdemeanor. Further, they say, the existence of a tax deficiency "without more would amount to a misdemeanor, if it had been lodged under § 7203. . . ."

They cite *Sansone* v. *United States,* 380 U.S. 343 (1965) as indicating that the distinguishing characteristic of § 7201 is a willful attempt to evade or defeat taxes. Counsel then argue that the only statement appearing in the record concerning defendant's understanding the charge is that the defendant said "it is not deliberate". His counsel now argue that the legal force of such a statement is not clear and yet the court made no attempt to clarify the statement by further questioning of defendant.

The government in reply points out that the plea of guilty was to count II, which charged a violation of § 7201, and that a plea of guilty to a lesser included offense may not be accepted without consent of the government. *United States* v. *McCue,* 160 F. Supp. 595, 602 (D.C. Conn. 1958). The government argues, in essence, and we agree with it, that, under this record, a plea of guilty forecloses applicability of a lesser included offense. Certainly there is no confusion evident upon the record before us. Defendant was represented by able counsel when his plea was entered. He was not then entitled to plead to a lesser included offense. He did not plead to such an offense. The point seems to have arisen as an appellate proceeding afterthought.

3. Finally, defendant urges that the trial judge erred by ignoring the information presented at the sentencing hearing and thereby failed adequately to establish the full factual basis for the plea of guilty. In addition to rule 11, defendant argues that a second procedural safeguard had been set up to supplement the constitutionally guaranteed rights of defendant in criminal prosecutions. See 18 U.S.C.A. rule 32 (a) (1) amended effective July 1, 1966, which reads:

> (1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. * * * Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

Counsel in their brief assert that the thrust of the amendment to rule 32 (a) (1) is the same as in the case of the amendment to rule 11. They say that the duties of the judge are indicated more clearly and that the amendment imposes an additional requirement that the judge address the defendant personally. Counsel for defendant admit that while the required hearing was held under the provisions of this rule, the information elicited "was ignored". We do not agree with the latter conclusion of counsel. The district judge observed the letter and spirit of the applicable provisions of the rules and gave proper weight to the substantial testimony presented and the facts otherwise shown to the court, as indicated herein.

The Notes of the Advisory Committee[3] include the following:

> "The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or *by examining the presentence report,* or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." (Emphasis supplied.)

It appears by the words of defendant's trial counsel in this case that he was quite aware of the fact that there had been a very thorough presentence investigation made. He stated to the district court:

> "I talked to the probation officer and we have been given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—I don't know truly what I could add except to indicate that he is completely contrite."

Nevertheless defendant's counsel argue in their brief in this court:

> "The conclusion is inescapable that the trial judge either failed to make a determination that a factual basis existed for a plea of guilty, or that he was in

[3] Fed. Rules Cr. Proc., rule 11, 18 U.S.C.A., 4th paragraph of Notes

error in reaching an affirmative determination on that issue without additional facts to support his conclusion."

This attack upon the action of the district judge we cannot sustain, in view of the facts that he ordered a presentence investigation, which was admittedly thorough and extensive, and that there are circumstances apparent in this record indicating that the court read the presentence report and satisfied itself by that examination of the existence of a factual basis for the plea. For instance, in a colloquy with defense counsel, in connection with the imposition of sentence, when counsel argued that defendant "never took one single step to delude the investigating officer", the court remarked:

• • • • •

"Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent."

• • • • •

"I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion the *manner in which the books were kept was not inadvertent.*" (Emphasis supplied.)

The court was of a similar opinion in another instance, a transaction involving a Blue Cross check. The court then expressed his views on the bookkeeping methods of defendant, information about which he could have obtained only from the presentence report, particularly about that check.[4]

We make the general observation that defendant was represented by retained competent counsel, who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty. See *United States* v. *Hetherington*, 7 Cir., 279 F. 2d 792 (1960), cert. denied 364 U.S. 908, where, at 795, we said, significantly: "The record shows that the defendant was represented by able counsel", and at 796, we said:

---

[4] We note also that the government charges that defendant did not ask to examine his preinvestigation report nor did he make it a part of the record on this appeal.

"• • • there is no merit to the contention that the defendant was coerced or did not know the consequences of his plea of guilty."

So it is in the case at bar.

For these reasons, the judgment from which this appeal was taken is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

(Caption omitted in printing)

Wednesday, January 10, 1968

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

ORDER DENYING REHEARING

(Caption omitted in printing)

Monday, February 5, 1968

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 1209—October Term, 1967

WILLIAM J. MCCARTHY,

Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

(Filed April 29, 1968)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

APPENDIX D

AMENDMENT V

United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 26, UNITED STATES CODE § 7201

Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

TITLE 18, UNITED STATES CODE

Federal Rules of Criminal Procedure, Rule 11

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea*. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.* As amended Feb. 28, 1966, eff. July 1, 1966.

[The portions of the Rule in italics are the additions to the Rule which constitute the Amendment of February 28, 1966 which became effective July 1, 1966.]

Respectfully submitted,

BARNABAS F. SEARS,
WAYLAND B. CEDARQUIST,
MAURICE J. MCCARTHY,
Attorneys for Petitioner.

Supreme Court of the United States

No. 1209 ---- , *October Term, 19* 67

William J. McCarthy,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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INDEX

List Of Authorities Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above case on January 10, 1968 and February 5, 1968.

OPINIONS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, did not render an opinion on this case. The opinion of the Court of Appeals for the Seventh Circuit (App., pp. 1a-9a) has not been reported at the time of the printing of this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on January 10, 1968, and a copy thereof is appended to this Petition in the Appendix at p. 10a. A Petition for Rehearing was denied by the aforesaid Court of Appeals on February 5, 1968, and a copy of the order by which the Petition for Rehearing was denied is appended to this Petition in the Appendix at p. 11a. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

The Questions Presented are:

1. Whether the total absence of any questioning of the Petitioner by the Trial Judge as to Petitioner's understanding of the nature of the charges against him can be considered to be a compliance with Rule 11 of the Federal Rules of Criminal Procedure.

2. Whether the District Court abused its discretion by entering a judgment of conviction after it knew or should have known that Petitioner did not understand the nature of the charge.

3. Whether the District Court denied Petitioner his rights under the Fifth and the Sixth Amendments to the Constitution by entering a judgment of conviction without any basis for a determination that the Petitioner understood the nature of the charge.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED.

The Fifth Amendment and the Sixth Amendment to the Constitution of the United States, 26 U.S.C. 7201, and Rule 11 of the Federal Rules of Criminal Procedure are set forth in the Appendix at pp. 23a-24a.

STATEMENT OF THE CASE.

This case arises under 26 U.S.C. 7201. The basic facts, which are not in dispute, are as follows:

William J. McCarthy, the Petitioner, is a resident of Chicago, Illinois. He is 66 years old and has 5 children. He has a High School education. He has never before been indicted or convicted of any Federal offense.

Petitioner had a lengthy history of alcoholism, for which he had been hospitalized. His drinking had affected his business, that of a Jobber in the Printing Trade. Following the time of the Indictment, and at approximately the time of the tender of a plea of guilty, Petitioner became a member of Alcoholics Anonymous.

On April 1, 1966 Petitioner McCarthy was indicted for Income Tax Evasion. The Indictment charged that he violated Section 7201 of the Internal Revenue Code (26 U.S.C. 7201) by filing a false return. The Indictment had three counts, one for each of the years, 1959, 1960 and 1961. The amounts of additional Income Tax alleged to be due were: $928.74 for 1959; $5,143.70 for 1960; and $1,207.12 for 1961.

Petitioner McCarthy responded to the Indictment by appearing in Court on April 14, 1966, with Counsel. At that time counsel waived reading of the Indictment and entered a Plea of Not Guilty to each Count.

The Petitioner again appeared before the District Court on July 15, 1966. His counsel stated that McCarthy wished to withdraw his Plea of Not Guilty to Count II of the Indictment and to enter a Plea of Guilty to that count. The Government moved to dismiss Counts I and III.

The Trial Judge asked Petitioner McCarthy whether he wanted to enter a Plea of Guilty to Count II; whether he understood that he was waiving his right to Trial by Jury; and whether he understood he might be imprisoned up to 5 years and fined up to $10,000. Petitioner answered each question affirmatively. The Trial Judge never personally questioned McCarthy as to his understanding of the nature of the crime charged against him. The retained counsel for the Petitioner was never asked if he had informed his client of the nature of the charge, nor did counsel volunteer such a statement.

Without any further questioning, the Trial Judge accepted the Plea of Guilty to Count II and entered a finding of Guilty. The Court then dismissed Counts I and III and ordered a Pre-Sentence Investigation. The matter was set for September 14, 1966 for sentencing.

Petitioner McCarthy next appeared before the District Judge on September 14 for sentencing. The Trial Judge asked McCarthy if he had anything to say before sentence was imposed. McCarthy stated that his actions were not deliberate but depended in part upon his health. There was no questioning by the Trial Judge as to what Petitioner meant by "not deliberate." Indeed there was no further questioning of McCarthy.

The Court entered a sentence of one year imprisonment plus a fine of $2,500.00. The Court and counsel for McCarthy then discussed the manner in which McCarthy's books had been kept. Counsel admitted that the books had been kept in a grossly negligent manner but observed that the negligence had not been in reference to taxation. The negligence, as counsel saw it, arose from Petitioner's

desire for personal spending money. He pointed out that the unreported item of income, a check from Blue Cross, had been deposited in a second bank account when Defendant was in a protracted drinking situation from which he was hospitalized. The Probation Officer suggested that Petitioner had become a member of Alcoholics Anonymous two months prior to the sentencing hearing and that his sponsor was in the courtroom and available to testify. The Court did not take any testimony and refused to vacate the sentence.

Notice of Appeal to the Court of Appeals for the Seventh Circuit was filed on September 23, 1966.

Before the Court of Appeals, Petitioner presented three arguments. The first argument was that Rule 11 of the Federal Rules of Criminal Procedure had been amended, effective July 1, 1966, two weeks prior to the tender of the Plea of Guilty. Petitioner's position was that the changes wrought in Rule 11 were critical in this case. The position of Petitioner is that Rule 11 as amended imposes additional affirmative duties on the Trial Judge. Principal among these is the duty to address the Defendant personally and determine that he understands the charge. The Government's Brief totally ignored the changes in Rule 11 and the arguments presented by Petitioner. Instead the Government argued and cited as authority cases decided prior to the 1966 Amendments to the Rules of Criminal Procedure. These cases held that Rule 11 could be satisfied informally and that there was no requirement for the Court to make a formal determination on Defendant's understanding of the charge.

In its decision the Court of Appeals for the Seventh Circuit cited the same cases, proposed by the Government, as authority, saying their reasoning was in "substantial accord with the result we now reach in this case." (App., p. 5a). The Court said nothing more with regard to an interpretation of the Amendment to Rule 11.

The second issue raised by the Petitioner was that the Trial Judge had abused his discretion by entering judgment on the plea. In support of this argument are these facts: The age of the Petitioner, 66 years; his lack of experience with Federal crimes; the state of his physical, mental and emotional health and stability in light of his alcoholism when the crime was alleged to have been committed and at the time the plea was offered; the complexity of the Government's theory of the case—negligence amounting to intentional tax evasion; an ambiguous statement made by Petitioner which amounted to a denial of the characteristic element of the crime charged. In light of all these facts, Petitioner argued, the Trial Judge should have inquired further. The Trial Judge did not inquire further, neither of Petitioner nor of his Counsel, and proceeded to enter judgment.

The Government answered Petitioner's argument that the failure of the Trial Judge to inquire further was an abuse of discretion by stating that Petitioner was represented by an attorney. The Government, however, does not deny that the Trial Judge failed to inquire of that attorney. The Court of Appeals agreed with the Government and observed that *counsel* for Petitioner was not confused and did not misunderstand the Indictment.

Petitioner's third and most basic argument rested on the Fifth and Sixth Amendments to the United States

Constitution. He argued that a Defendant has a fundamental right to be informed of the nature and cause of an accusation. This right has been implemented by the Federal Rules of Criminal Procedure, Rule 11 in this case. In addition, regardless of the presence or absence of counsel, and regardless of any subsequent presentence or other report, the understanding of the accused as it appears in the transcript of proceedings at the time of tendering the plea is the sole determinant of compliance with this Constitutionally protected right.

The brief of the Government is silent on this argument. The opinion of the Court of Appeals acknowledges that the argument was made by Petitioner but does not answer or decide the argument, nor does the Court indicate why a decision on this point was refused.

REASONS FOR GRANTING THE WRIT.

A. THIS CASE HIGHLIGHTS A SERIOUS DIVISION AMONG THE COURTS OF APPEALS AS TO CRIMINAL PROCEDURE RULE 11. REVIEW BY THIS COURT IS NEEDED, NOT ONLY TO PROTECT DEFENDANT'S RIGHTS, BUT TO ASSURE UNIFORM APPLICATION OF THE RULE.

1. Substantial conflict now exists, by reason of the holding in this case, among the Circuit Courts of Appeals on interpretation of Rule 11 of the Federal Rules of Criminal Procedure. In particular, the Ninth Circuit, sitting *en banc* in the case of *Heiden* v. *United States*, 353 F. 2d 53 (1965), has held that the error of the Trial Judge in failing to ascertain a defendant's understanding at the time of accepting a plea could not be eliminated by a subsequent hearing. The Court there placed the burden of establishing defendant's understanding upon the Government. On the other hand, the opinion of the Seventh Circuit in the present case holds that there is no requirement that a Trial Judge make a determination of defendant's understanding of the charge when accepting the plea.

The holding of the *Heiden* case is an amplification of the rule in *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9, 1964) which was cited by the Advisory Committee in suggesting the 1966 amendment to Rule 11. The rule as amended added an affirmative duty on the Trial Judge to address a defendant personally and determine his understanding at the time the Plea of Guilty is tendered. The wording of the Rule is clear and unambiguous. The rule does not allow any discretion to the Trial Judge with regard to making or not making a determination of defendant's understanding of the charge. The rule is mandatory. It reads, in pertinent part:

> ". . . The Court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . ."

The decision in the *Heiden* case applied to a plea tendered before Rule 11 was amended. The rationale of that case is that fundamental fairness to the defendant requires that the Trial Judge make an independent inquiry of a defendant personally to determine his understanding at the time of tendering the plea.

2. The Seventh Circuit seems to base its decision in the present case on the fact that the defendant's counsel was present at the hearings on defendant's plea.

Petitioner urges that the presence or absence of counsel, in and of itself, is not sufficient to relieve the Trial Judge of his duties under Rule 11. The recent case of *Halliday* v. *United States,* 380 F. 2d 270 (C.A. 1, 1967) considered this point at some length. The Court there said, at p. 272:

> "The Government cites no case holding that the facts that the defendant had heard the indictment and certain testimony, and was represented by counsel, in themselves form a sufficient basis for the requisite findings. Something more is needed. See *Domenica* v. *United States,* 1 Cir., 1961, 292 F. 2d 483; *Gundlach* v. *United States,* 4 Cir., 1958, 262 F. 2d 72, Cert. denied, 360 U.S. 904, 79 S. Ct. 1283, 3 L. Ed. 2d 1255. To the extent that *United States* v. *Hetherington,* 7 Cir., 1960, 279 F. 2d 792, Cert. denied, 364 U.S. 908, 81 S. Ct. 271, 5 L. Ed. 2d 224, may be thought to suggest the contrary, we disagree. We may concede that there was nothing to indicate that the defendant was not acting voluntarily and with full understanding.

This did not satisfy the rule. The rule imposed a burden of inquiry. *Julian* v. *United States*, 6 Cir., 1956, 236 F. 2d 155. Although the circumstances suggested no negative finding, they did not warrant an affirmative one.

It should be noted that the Seventh Circuit in the present case cited the *Hetherington* Case (supra) as controlling; but the *Halliday* case expressly disagrees with the rationale of the *Hetherington* case; and, to that extent, a further division among the Circuit Courts of Appeals is evident. Furthermore, the *Halliday* case specifically holds that Rule 11, even prior to the 1966 Amendment, imposed a *duty of inquiry* upon the Trial Judge. The Sixth Circuit reached the same conclusion as to a duty of inquiry in the case of *Fultz* v. *United States*, 395 F. 2d 404 (C.A. 6, 1966). The position of the Petitioner is that the Amendment of 1966 expanded that duty and made it more explicit. Note should be taken of the instant facts. In this case there was no reading of the Indictment in open court and no testimony was taken or statement made by the Government regarding the charge.

B. THE SIGNIFICANCE OF REVIEW OF RULE 11 EXTENDS FAR BEYOND THE PRESENT CASE.

The interpretation and application of Rule 11 is a recurring question of great importance. Approximately 80% of all criminal cases in the District Courts of the United States are disposed of on Pleas of Guilty (Cf. 8 Moore's Federal Practice 11-4, n. 6).

The importance of a definitive statement on Rule 11 as amended falls in two categories. First, guidelines set by this Court will assure equal justice and consistent procedures to the criminally accused in all of the District

Courts. Second, a clarification of the procedures to be followed by District Judges in accepting Pleas of Guilty will encourage closer attention by the District Judges which should eventually reduce attacks upon the acceptance procedure as applied to individual defendants. Considering the trial time saved by Pleas of Guilty, and considering the length of imprisonment a defendant may face, the small amount of additional time which would be required for a careful observance of the Rule is well warranted. In the *Heiden* case the Court also observed:

> The Rule thus contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset, and that courts are to be freed from the troublesome task of searching at a later date for the truth as to the defendant's then state of mind. 353 F. 2d 53, 55.

The strengthening of Rule 11 by the 1966 Amendment reinforces the logic of the *Heiden* Court's observations.

C. A CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE HAS NOT BEEN ANSWERED.

An unresolved question of Constitutional interpretation is also present. Petitioner has argued that the Sixth Amendment guarantee of a right to be informed of the nature and cause of an accusation requires that the proceedings in open court show that the defendant has been informed and does, in fact, understand the charge. Petitioner further argues that the right to be fully and completely informed is basic and is included within the due process guarantee of the Fifth Amendment. The record in this case is silent on the issue of Petitioner's understanding except for a statement by Petitioner that his actions were "*not deliberate*" and were due in part to his "*health.*"

(App., p. 15a) In view of the nature of the crime, which requires a *specific intent* to defraud, the statement of Petitioner is in effect a denial of guilt, or, at the very least, raises a substantial question as to what he meant by his plea.

At that point the unavoidable duty of the Trial Judge was to inquire further of Petitioner in order to clear the confusion in the record. No further questions were asked, and judgment was immediately entered. (App., p. 16a).

Petitioner's argument is that a conviction which is based upon a record which does not show any attempt by the Trial Judge to establish the understanding of a defendant falls short of fulfilling the "due process" requirement of the Fifth Amendment.

In addition, the Seventh Circuit's decision in this case affirms *Lowe* v. *United States*, 367 F. 2d 44 (C.A. 7, 1966) (App., p. 5a); but *Lowe* (which holds that the Trial Judge is *not* required to make a determination of a defendant's understanding) is diametrically opposed to the language of Rule 11. If Rule 11 is an implementation of the Sixth Amendment, then a failure to closely observe the dictates of Rule 11 is a deprivation of a Constitutionally protected right and a failure to observe the due process of the law.

In the present case there is absolutely no indication in the record that defendant was ever informed of the true nature of the charge. Regardless of the fact of retained counsel, and regardless of the presentence investigation report, the record of the proceedings in open court is fatally defective. No matter how competent and knowledgeable the attorney and the probation officer may have

been, the knowledge and understanding which either of them may possess is immaterial. The critical question, the only relevant question, is whether or not defendant was fully informed and understood the charge at the time the plea was tendered and accepted.

The record contains no direct questioning by the Trial Judge and no statements by counsel as to Petitioner's understanding. The only statement made by defendant which sheds any light on his awareness of the charge is as follows:

> "I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things I have gone through that it never would have happened and it is not deliberate and I am very sorry." (App., p. 15a)

That statement amounts to an act of contrition, but not to an expression of understanding nor of guilt. The entry of judgment on such a record is a violation of Petitioner's rights under the Fifth and Sixth Amendments.

The case of *Hulsey* v. *U. S.*, 369 F. 2d 284 (C.A. 5, 1966), presents a situation similar to the instant appeal. In that case an admitted alcoholic was charged with the interstate transportation of forged securities with fraudulent intent. The defendant pleaded guilty to endorsing the securities; and, upon questioning by the Judge, stated that he recognized the endorsement as his own but could not remember whether the securities in question were forged or not because he had been drinking heavily and could not account for his behavior. The Trial Court accepted the plea, entered judgment, and sentenced the defendant. An appeal was perfected. The Court of Appeals reversed the decision and stated:

"Pleading guilty to the mere endorsement of an instrument, while disclaiming any knowledge of whether it was forged, even aided by the strongest persumption of appellant's comprehension of the offense charged, cannot be viewed as tantamount to an unconditional assertion of guilt to the fraudulent interstate transportation of a forged security with knowledge of the forgery. If anything, such response appears more closely akin to a protestation of innocence than an expression of guilt. It would have been a simple matter for the trial court, when confronted with such equivocal response, to delay accepting the plea until further inquiry clearly established that the accused understood the elements of the crime charged in the information and was willing to enter an unequivocal admission of guilt. See *Kreuter* v. *United States,* 10th Cir. 1952, 201 F. 2d 33. On the other hand, if after being fully apprised of the nature of the charge and the consequences of his plea, the accused persisted in attempting to enter a qualified plea, the trial court should have refused to accept it and set the case for trial. *State* v. *Stacy,* 1953, 43 Wash. 2d 358, 261 P. 2d 400; *People* v. *Morrison,* 1957, 348 Mich. 88, 81 N.W. 2d 667, cf. *Bergen* v. *United States,* 8th Cir., 1944, 145 F. 2d 181. Nothing we have said is intended to suggest that the acceptance of a plea of guilty which merely fails to comply with precise ceremonial or verbal formality will necessitate the setting aside of an otherwise valid conviction and sentence. See *United States* v. *Cariola,* 8th Cir., 1949, 177 F. 2d 505. We are convinced, however, that a fundamental requisite of a plea of guilty is that it manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if so limited or conditioned that it constitutes, as in the instant case, little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence. To require that a plea of guilty

which, when accepted by the court, in itself constitutes a conviction no less conclusive than the verdict of a jury, must manifest an unqualified admission of the offense charged, is not to exalt form over substance nor to place a premium upon mere technical verbiage; it is merely to implement a fundamental requirement of due process essential to the fair and just administration of the criminal laws. 369 F. 2d 284, 287."

CONCLUSION.

The facts of this case are not complicated. The Defendant, charged with one of many varieties of Federal Income Tax violation, and represented by Counsel, pleaded Guilty, under circumstances which indicate that his rights were not fully protected. Specifically, the Trial Judge did not question the Defendant as to *his* understanding of the nature of the charge, but the Trial Judge nevertheless entered Judgment on the Plea of Guilty.

Rule 11 of the Federal Rules of Criminal Procedure, as amended, specifically requires the Trial Judge to question the Defendant himself on this very point.

The question in this case is whether Rule 11 means what it says. The Seventh Circuit interprets Rule 11 as though it had been further amended by the words "but not when there is counsel present." For this reason alone, the Decision requires review. In addition, the Decision should be reviewed because of the conflict it creates between Decisions of the various Circuits on this critical aspect of the administration of Criminal Justice in the Federal Courts.

It is therefore respectfully urged that a Writ of Certiorari to the Seventh Circuit be granted herein.

Respectfully submitted,

BARNABAS F. SEARS,
WAYLAND B. CEDARQUIST,
MAURICE J. MCCARTHY,
33 N. La Salle Street,
Chicago, Illinois 60602,
Attorneys for Petitioner.

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 15929 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM J. McCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 10, 1968

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* William J. McCarthy, defendant, has appealed from a judgment of the district court, convicting him, on his plea of guilty, of a violation of § 7201 of the Internal Revenue Code (26 U.S.C. § 7201), as charged in an indictment, upon which he was given a prison sentence of one year and ordered to pay a fine of $2500 and costs.

The first question raised here is whether the plea of guilty was accepted in accordance with rule 11 of the Federal Rules of Criminal Procedure,[1] and the second

[1] 18 U.S.C.A. Rule 11, which provides:
A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining

is whether the court abused its discretion in entering judgment after it allegedly knew or should have known that defendant did not understand the nature of the charge. Lastly an issue is raised as to whether the court denied defendant his rights under the fifth and sixth amendments to the constitution, by entering judgment without any basis for a determination that the defendant understood the nature of the charge.

The grand jury, in count II, charged that defendant wilfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him for the calendar year 1960, by filing and causing to be filed a false and fraudulent income tax return stating his taxable income was $16,804.59 and the tax due was $4,193.56, whereas, as he then and there well knew, they were $29,738.85 and $9,337.26, respectively, in violation of said § 7201.

On April 14, 1966, government attorney Galbraith and attorney Sokol, representing defendant, together with defendant, appeared in court and a plea of not guilty was entered. The cause was then set for trial on June 13, 1966.(2)

When the case was called for trial on July 15, 1966, there were present defendant's counsel Sokol and government attorney Hughes, as well as defendant. The following proceedings then occurred:

> Mr. Sokol: * * * If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

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(1) (Continued)
that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(2) A succession of postponements was thereafter ordered including a setting for trial on July 15, 1966.

The Court: Is that satisfactory to the government?

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of $10,000?

Defendant: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

* * * * *

Defendant: That's right, of my own volition, your Honor.

The Court: All right. Enter a pretrial investigation order and continue the matter until the 14th day of September. Same bond may stand.

On September 14, 1966, the case was called for disposition and the court asked defendant personally if he had "anything to say prior to the time that sentence is imposed?" He asked a similar question of defense counsel. The court heard their answers. Sentence was then imposed. The court also stayed execution for sixteen days.

1. Defendant's counsel urge that, because of three changes made in rule 11, Federal Rules of Criminal Procedure, effective *July 1, 1966,* the conviction of defendant on his plea of guilty herein should be reversed. First, they say that a judge is now *required* to address the defendant *personally.* Secondly, they say a judge is now required to "determine from his personal interrogation of defendant that he understands the consequences of the plea", and thirdly the court must determine that there is a factual basis for the plea. However, it is clear the district judge in this case had these recent changes in mind, as the contents of his remarks and questions to defendant indicated.

Counsel for appellant urge that defendant did not understand the nature of the charge against him. They

base this upon defendant's own statement to the district judge when he was asked if he had anything to say prior to the imposing of sentence. The record shows that defendant then said:

> "I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry."

They also rely on the fact that the probation officer informed the court that "defendant had become a member of Alcoholics Anonymous at approximately the time the guilty plea was entered" and that the court was also informed that defendant "is 66 years of age, who had been hospitalized at one time for alcoholism".

However, a complete answer to this contention is that the offense involved here refers to the filing of defendant's income tax return for the year 1960, which occurred on March 19, 1961, or about five years before sentencing which did not occur until 1966. On this appeal the critical date as to defendant's physical and mental being was July 15, 1966 when his plea of guilty was entered—not some five and a half years before sentencing.

Under these facts, we hold that the district court satisfied the requirements of rule 11 in effect on and after July 1, 1966, in accepting defendant's plea of guilty. *Cf. United States* v. *Rizzo,* 7 Cir., 362 F.2d 97, 99 (1966); and *United States* v. *Lowe,* 7 Cir., 367 F.2d 44, 45 (1966). While these cases involved sentencing before July 1, 1966, we find their reasoning in substantial accord with the result we now reach in this case.

2. Next, defendant's counsel contend that the charges made against defendant were complicated and may well have been confused by defendant with lesser included offenses within § 7201, inasmuch as count II of the indictment charged violation of § 7201 of the Internal Revenue Code, by the filing of a "false and fraudulent income tax return". Defendant's counsel insist that such an allegation is undoubtedly quite common, since such an allegation would also form the basis for a violation of § 7207, which

would amount to a misdemeanor. Further, they say, the existence of a tax deficiency "without more would amount to a misdemeanor, if it had been lodged under § 7203. . . ."

They cite *Sansone* v. *United States,* 380 U.S. 343 (1965) as indicating that the distinguishing characteristic of § 7201 is a willful attempt to evade or defeat taxes. Counsel then argue that the only statement appearing in the record concerning defendant's understanding the charge is that the defendant said "it is not deliberate". His counsel now argue that the legal force of such a statement is not clear and yet the court made no attempt to clarify the statement by further questioning of defendant.

The government in reply points out that the plea of guilty was to count II, which charged a violation of § 7201, and that a plea of guilty to a lesser included offense may not be accepted without consent of the government. *United States* v. *McCue,* 160 F. Supp. 595, 602 (D.C. Conn. 1958). The government argues, in essence, and we agree with it, that, under this record, a plea of guilty forecloses applicability of a lesser included offense. Certainly there is no confusion evident upon the record before us. Defendant was represented by able counsel when his plea was entered. He was not then entitled to plead to a lesser included offense. He did not plead to such an offense. The point seems to have arisen, as an appellate proceeding afterthought.

3. Finally, defendant urges that the trial judge erred by ignoring the information presented at the sentencing hearing and thereby failed adequately to establish the full factual basis for the plea of guilty. In addition to rule 11, defendant argues that a second procedural safeguard had been set up to supplement the constitutionally guaranteed rights of defendant in criminal prosecutions. See 18 U.S.C.A. rule 32 (a) (1) amended effective July 1, 1966, which reads:

> (1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. * * * Before imposing sentence the court shall afford counsel an

opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

Counsel in their brief assert that the thrust of the amendment to rule 32 (a) (1) is the same as in the case of the amendment to rule 11. They say that the duties of the judge are indicated more clearly and that the amendment imposes an additional requirement that the judge address the defendant personally. Counsel for defendant admit that while the required hearing was held under the provisions of this rule, the information elicited "was ignored". We do not agree with the latter conclusion of counsel. The district judge observed the letter and spirit of the applicable provisions of the rules and gave proper weight to the substantial testimony presented and the facts otherwise shown to the court, as indicated herein.

The Notes of the Advisory Committee[3] include the following:

"The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or *by examining the presentence report,* or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." (Emphasis supplied.)

It appears by the words of defendant's trial counsel in this case that he was quite aware of the fact that there had been a very thorough presentence investigation made. He stated to the district court:

"I talked to the probation officer and we have been given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—I don't know truly what I could add except to indicate that he is completely contrite."

[3] Fed. Rules Cr. Proc., rule 11, 18 U.S.C.A., 4th paragraph of Notes.

Nevertheless defendant's counsel argue in their brief in this court:

> "The conclusion is inescapable that the trial judge either failed to make a determination that a factual basis existed for a plea of guilty, or that he was in error in reaching an affirmative determination on that issue without additional facts to support his conclusion."

This attack upon the action of the district judge we cannot sustain, in view of the facts that he ordered a presentence investigation, which was admittedly thorough and extensive, and that there are circumstances apparent in this record indicating that the court read the presentence report and satisfied itself by that examination of the existence of a factual basis for the plea. For instance, in a colloquy with defense counsel, in connection with the imposition of sentence, when counsel argued that defendant "never took one single step to delude the investigating officer", the court remarked:

* * * * * *

> "Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent."

* * * * * *

> "I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion the *manner in which the books were kept was not inadvertent.*" (Emphasis supplied.)

The court was of a similar opinion in another instance, a transaction involving a Blue Cross check. The court then expressed his views on the bookkeeping methods of defendant, information about which he could have obtained only from the presentence report, particularly about that check.(4)

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(4) We note also that the government charges that defendant did not ask to examine his preinvestigation report nor did he make it a part of the record on this appeal.

We make the general observation that defendant was represented by retained competent counsel who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty. See *United States* v. *Hetherington*, 7 Cir., 279 F.2d 792 (1960), cert. denied 364 U.S. 908, where, at 795, we said, significantly: "The record shows that the defendant was represented by able counsel"; and at 796, we said:

> "* * * there is no merit to the contention that the defendant was coerced or did not know the consequences of his plea of guilty."

So it is in the case at bar.

For these reasons, the judgment from which this appeal was taken is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Wednesday, January 10, 1968

Before

Hon. J. Earl Major, Senior Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 15929 vs.

WILLIAM J. McCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Monday, February 5, 1968

Before

Hon. J. Earl Major, Senior Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 15929 vs.

WILLIAM J. MCCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX D

Page of Record

38 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois on Friday, July 15, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,
By: Mr. Patrick J. Hughes,
Assistant United States District Attorney,
on behalf of the government;
Mr. Bernard Sokol,
on behalf of the defendant.

39 The Clerk: 66 CR 209, U.S.A. vs. William J. McCarthy, trial.

Mr. Sokol: Good morning, your Honor. This matter was set over because of my inability to appear.

The Court: What case is this? I don't even know.

Mr. Sokol: This is United States vs. William J. McCarthy, 66 CR 209, a tax fraud case.

The Court: It was set over for arraignment or what?

Mr. Sokol: No, set over for trial. At arraignment, a plea of not guilty was entered to all three Counts. Mr. Galbraith then appeared for the United States. Mr. Hughes now appears today.

If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty

heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

40 The Court: Is that satisfactory to the government?

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant McCarthy: Yes, your Honor.

41 The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant McCarthy: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of $10,000?

Defendant McCarthy: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant McCarthy: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

42 Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant McCarthy: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

Defendant McCarthy: I beg your pardon?

The Court: Has anybody threatened you to enter a plea of guilty?

Defendant McCarthy: That's right, of my own volition, your Honor.

The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand.

Mr. Sokol: Thank you very much.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

43 Certificate of Official Court Reporter.

24 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Wednesday, September 14, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,
By: Mr. Robert A. Galbraith,
Assistant United States District Attorney;
on behalf of the government;
Sokol, Schwab & Angram,
By: Mr. Bernard A. Sokol,
on behalf of the defendant;
Probation Officer Joseph Sanculius

25 The Clerk: 66 CR 209, United States vs. William J. McCarthy, disposition report on Count 2.

Mr. Galbraith: Good morning, your Honor.

The Court: Mr. McCarthy, do you have anything to say prior to the time that sentence is imposed?

Defendant McCarthy: I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry.

The Court: And you, Mr. Sokol, on his behalf, have you something to say?

Mr. Sokol: Only this, if the Court please; I am quite aware of the fact that there has been a very thorough pre-sentence investigation made in this case. I talked to the probation officer and we have been

given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—
26 I don't know truly what I could add except to indicate that he is completely contrite.

The Court: And you, Mr. Galbraith?

Mr. Galbraith: Your Honor, only to this extent, as you probably recall, this was originally a three Count indictment in which the government moved to dismiss Counts 1 and 3 at the time that the defendant pled to Count 2. The prime consideration of that was an understanding between the parties that all taxes, penalties and interest would be paid and I just would ask your Honor if you would incorporate some reference to that in the disposition of the matter.

Mr. Sokol: There has never been any disposition to avoid such a consequence.

The Court: I mean, the report indicates that he has ample assets for the government to attach, much in excess of the amount of owed taxes.

Well, I think that with the amount involved here that the deterrent effect of a sentence is desirable. Because of that, the defendant will be sentenced to the custody of the Attorney General for one year and fined $2,500.

Mr. Sokol: Your Honor, may I please ask that
27 the sentence itself be suspended? I would like to, if I may, be heard.

The Court: I will be happy to hear you.

Mr. Sokol: Thank you.

If the Court please, apart from the wrecking of his physical health that has attended a number of the problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs no deterrent. I cannot imagine a man—apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

When I spoke with Mr. Sanculius, I knew that we had given to him some reference to the fact and some
28 attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

Mr. Sokol: I am sorry, your Honor, I did not hear the beginning.

The Court: I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion

the manner in which the books were kept was not inadvertent.

Mr. Sokol: Your Honor, it had no reference to taxation. I would like to be heard on that, because we went into this in considerable detail.

When a man is neglectful and adopts a kind of a devious way of secreting himself from the govern-
29 ment, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this—he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that time he had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks. His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, "You have to put yourself under the jurisdiction of your brother," and there was some indication that he was supposed to deposit this and he would not have disposition over his own assets. They did not feel that
30 he could look out for himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps

guess without going into Freudian terms he was oppressed, and in order to free himself—and this had nothing to do with the government—in order to free himself from what he felt was a trap situation where he, at the age of sixty-two or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has—and it is like a little boy—if he has the consequence lying before him he says, "Oh, yes."

In other words, he does not run away if he is faced with it, but that he himself be guided there.

Your Honor, at the age of sixty-five, particularly
31 with this kind of situation, I am positive with all of the help that he has sought and with the—he is actually now—he is no longer his own prisoner, but he is, I think, very, very much confined in terms of the kinds of help he has sought out and I would most entreat your Honor to give him an opportunity to prove to himself as well as to the Court that the remaining years of his life can be acted out in an adult fashion rather than in the little boy behavior that has tended so much of his conduct.

The Court: I mean, if you are still a little boy at the age of sixty-six, why, there is not much time to prove whether you can become an adult.

Mr. Sokol: Your Honor, there is always something to save. If I were ninety years old and they told me I had ten days left, I would want to make those ten days something healthy rather than something sick.

The Court: Anything further?

Mr. Sokol: No, your Honor.

Officer Sanculius: Your Honor, may I say a word.

The Court: Yes, Officer.

Officer Sanculius: Your Honor, I just wondered
32 whether you had received the additional—

The Court: Even if he had not got that pardon anything that happened that long ago has no bearing on what I have done.

Officer Sanculius: The other thing I had in mind, your Honor, is that I have verification that he has been attending the AA group for the past two months and his sponsor is here in Court to verify that if necessary.

The Court: Well, I assume that is unquestionably true. I have known people to get in and out of that club, you know, about every six months. They become a member and cease to be a member and then they become a member.

Mr. Sokol: Your Honor, could your Honor please entertain my motion and try him, please? I am sure that perhaps he can indicate to the Court how much he wants to make good.

The Court: I am sure that he does. Everybody that is confronted with what he is confronted with here has that desire. I feel certain that that is the fact. However, I think that having—

Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of
33 what can best be described as gross neglect, and criminal neglect, if you please.

I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage

But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took place over a series of four years, didn't it, Counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel
34 in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accomplie.

There is no aspect of his existence right now where he has not said, "I am wrong and I need guidance and I will do what somebody else says."

So whether it relates to the matter of drinking, he is with AA, if it relates to the matter of religious discipline, he has put himself very, very closely on a day to day and week to week responsibility arrangement.

Mrs. McCarthy is here and can testify to the fact that the idea of accountability is very, very much more in his picture.

The big thing, I think, is that so far as accountability to his government is concerned, that before this indictment took place, he had already put himself into Mr. Angram's hands. It was through Mr. Angram that a number of these things were crystallized, and they were submitted.

The Court: All right, the sentence heretofore entered is not vacated; a year in the custody of the Attorney General and $2,500 fine.

Mr. Sokol: May we have a stay of execution for ten days, if the Court please.

The Court: Execution for ten days.

The Marshal: He is to surrender to the Marshal at noon on the tenth day?

The Court: Surrender to the Marshal on the 26th day of September at noon.

Defendant McCarthy: Your Honor, could I make a little statement, please.

The Court: What? I cannot hear you.

Defendant McCarthy: I'm handling the printing of the ballots for the County at the moment. It is going into the hands of Mr. Barrett and will take at least fifteen days. I handle it myself personally and it will take fifteen days to complete it.

The Court: I will extend the stay of execution until noon on the 30th of September, which is sixteen days. Noon on the 30th of September you are to surrender to the Marshal.

(Which were all of the proceedings taken and had in the above-entitled cause on the above-mentioned date.)

APPENDIX E

AMENDMENT V

United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 26, UNITED STATES CODE § 7201

Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

TITLE 18, UNITED STATES CODE

Federal Rules of Criminal Procedure, Rule 11

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a judgment upon a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.* As amended Feb. 28, 1966, eff. July 1, 1966.

[The portions of the Rule in italics are the additions to the Rule which constitute the Amendment of February 28, 1966 which became effective July 1, 1966.]

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1209

WILLIAM J. McCARTHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted on three counts of wilfully attempting to evade income taxes in violation of Section 7201 of the Internal Revenue Code. He was convicted on his plea of guilty to one count and was sentenced to one year in prison and a fine of $2,500. The other two counts were dismissed. (Pet. 1a).

Petitioner's contention here is that the trial court, in accepting the guilty plea, failed to make certain that petitioner understood the charge against him. This claim was never made before the trial court either at the time of the plea, at sentencing, or by motion to withdraw the plea.[1] At all events, the cir-

[1] The United States did not argue that the court of appeals should decline to hear the question because of the failure to raise it in the trial court.

cumstances displayed in the record refute the argument.

Immediately before offering the plea, petitioner's retained counsel[2] advised the court that "[t]his is * * * a tax fraud case" (Pet. 12a) and the court, before addressing petitioner, asked the prosecuting attorney, "This is tax evasion * * *?" (Pet. 13a). After the prosecutor responded affirmatively, the following colloquy then took place between the court and petitioner (Pet. 13a–14a):

> The COURT. Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. You understand you may be fined in an amount not in excess of $10,000?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. Knowing all that, you still persist in your plea of guilty?
>
> Defendant MCCARTHY. Yes, your Honor.

Petitioner again stated his willingness to plead guilty when the court, at the request of the prosecutor,

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[2] Different counsel has represented petitioner in the court of appeals and in this Court.

sought to determine whether any threats or promises had been used to induce the plea (Pet. 14a).

We recognize that the trial court did not expressly ask whether petitioner understood what was meant by "tax fraud" and "tax evasion." But this fact does not contravene the requirement of Rule 11 of the Federal Rules of Criminal Procedure that the "court * * * shall not accept such plea [of guilty] * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." There is no set formula of inquiry that must be followed in every case. As the Ninth Circuit said in *Munich* v. *United States*, 337 F. 2d 356, one of the cases cited favorably by the Advisory Committee which formulated Rule 11 (337 F. 2d at 359):

> In determining these questions the court is not required to follow any particular ritual, and it is not necessary that the court personally explain to the defendant the nature of the charge. * * * [Footnotes omitted.]

What the trial judge must do is view all the circumstances before him and determine whether the defendant has the requisite understanding. Here petitioner's repeated declarations that his plea was voluntary, his stated understanding that he could be imprisoned and fined, the fact that he was an experienced businessman, and his counsel's statement (Pet. 12a) that he had "advised Mr. McCarthy of the consequences

of a plea,"[3] all justified the acceptance of petitioner's plea.

Notably, even now petitioner's contention does not focus on the events of the day his plea was accepted. Rather, he contends (Pet. 12–13) that a part of a statement he made two months later, just before the imposition of sentence, shows that he did not understand that fraudulent intent is an element of the crime. But petitioner's statement (Pet. 15a), "I am very unhappy * * * that this happened and I am sure that if it were not for my health * * * that it never would have happened and it is not deliberate * * *," must be placed in the setting of all that was said in court that day. In the colloquy (Pet. 16a–22a) that followed sentencing, petitioner's then counsel sought to persuade the court to suspend the jail term by arguing that the tax evasion was but part of a scheme having as its principal purpose the secreting of funds to buy liquor. Even then, counsel did not assert a lack of criminal intent. He described petitioner's conduct (Pet. 20a–21a) "as gross neglect, and criminal neglect * * * ." The trial judge, in response, stated that he found adequate evidence of unlawful intent in the presentence report's description of petitioner's man-

[3] The court below did not, as petitioner asserts (Pet. 16), read Rule 11 as not requiring the court to address itself to a defendant represented by counsel. The court did (Pet. 9a) "make the general observation that defendant was represented by retained competent counsel who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty." The presence of counsel is surely one factor to be considered under Rule 11. See *Munich*, *supra*, 337 F. 2d at 359 n.5.

ner of bookkeeping (Pet. 17a–18a) and the number of years over which petitioner's conduct lasted (Pet. 21a). In these circumstances it was proper to impose sentence on the basis of the guilty plea.[4]

2. There is no conflict (Pet. 9) between this case and *Heiden* v. *United States*, 353 F. 2d 53 (C.A. 9). In *Heiden*, the defendant pleaded guilty, waived counsel, and was sentenced to 20 years in prison for bank robbery. The court of appeals reversed when, in a subsequent proceeding brought under 28 U.S.C. 2255 to set aside the sentence, the defendant testified that he had been led to believe, prior to the plea, that the maximum sentence was only 10 years.

In *Heiden* and in three other cases that petitioner argues are inconsistent with the ruling below, *Munich* v. *United States*, *supra*,[5] *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1), and *Fultz* v. *United States*, 365 F. 2d 404 (C.A. 6), there is no indication that the trial judge addressed any questions to the defendant. In *Hulsey* v. *United States*, 369 F. 2d 284 (C.A. 5), the other case petitioner relies on, the defendant had not in fact pleaded guilty to the charge of transporting in interstate commerce a falsely made and forged security. He admitted "endorsing the check" but in the

[4] In addition, at the time of sentencing the prosecutor stated, and petitioner's counsel agreed, that "[t]he prime consideration" for the government's motion to dismiss Counts 1 and 3 "was an understanding between the parties that all taxes, *penalties* and interest would be paid * * *" (Pet. 16a) (emphasis added). Such an agreement is inconsistent with any notion that petitioner denied fraudulent intent.

[5] In *Munich* the clerk, but not the court, asked if the defendant understood the charge (337 F. 2d at 360), but there was no inquiry as to whether the plea was voluntary.

same breath said, "I don't remember anything about whether it was forged or not" (369 F. 2d at 286). None of these circumstances exist here.*

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

APRIL 1968.

* In *Heiden* and *Hulsey*, the defendant was without counsel; in *Fultz*, counsel was not appointed until the day the plea was offered; and in *Munich*, counsel did not state whether he had advised the defendant with respect to the guilty plea.

U.S. GOVERNMENT PRINTING OFFICE: 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [illegible] 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER

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INDEX TO BRIEF

List Of Authorities

Cases:

Others:

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vs.

UNITED STATES OF AMERICA,

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER

OPINIONS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, did not write an Opinion. The Opinion of the Court of Appeals for the Seventh Circuit is set forth at A. 19-27. It is as yet unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 USC 1254(1). The Court of Appeals for the Seventh Circuit rendered judgment on January 10, 1968 (A. 28). It denied rehearing on February 5, 1968 (A. 28). This Court granted Certiorari on April 29, 1968 (A. 29).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

Constitutional provisions, statutes and rules involved are the Fifth and Sixth Amendments to the Constitution of the United States (A. 30), and Section 7201 of the Internal Revenue Code (26 USC 7201; A. 31) and Rule 11 of the Federal Rules of Criminal Procedure (A. 31).

QUESTIONS PRESENTED.

1—Whether the total absence of any questioning of Petitioner by the District Court prior to sentencing as to Petitioner's understanding of the nature of the charges against him is a compliance with Rule 11 of the Federal Rules of Criminal Procedure.

2—Whether the District Court abused its discretion by entering a judgment of conviction after it knew or should have known that Petitioner did not understand the nature of the charge.

3—Whether the District Court denied Petitioner his rights under the Fifth and the Sixth Amendments to the Constitution by entering a judgment of conviction without any ground for determining that Petitioner understood the nature of the charge and that a factual basis existed for Petitioner's plea of guilty.

STATEMENT OF THE CASE.

On April 1, 1966, Petitioner was indicted in three Counts under Section 7201 of the Internal Revenue Code (28 USC 7201) for income tax evasion. Each Count charged the filing of a false and fraudulent income tax return. Counts I, II and III covered 1959, 1960 and 1961, respectively and charged additional taxes due and owing of $928.74 for 1959, $5143.70 for 1960 and $1207.12 for 1961 (A. 2-3).

Petitioner retained counsel and with counsel appeared in the District Court on three occasions. The first was at the arraignment on April 14, 1966. Petitioner's counsel, both before and after receiving a copy of the indictment, waived its reading and entered a plea of not guilty for Petitioner. In answer to the Court's inquiry as to a trial date, Petitioner's counsel stated that he didn't "contemplate any preliminary motions" because he had "already had some discussions with Mr. Galbraith" (Government counsel), and suggested a June date, which the Court "fixed at June 13, 1966" (A. 4).

On June 13th, the Government moved *ex parte* to reset the trial date from June 20th to July 15th because "of the defendant's illness". The Court inquired as to the length of trial and the Government counsel replied that "[i]t is anticipated the matter will not go to trial, according to counsel". It was thereupon continued to July 15, 1966 (A. 5).

Petitioner's second appearance with retained counsel was on July 15, 1966. At this time his counsel (Mr. Sokol) stated to the Court that he had advised Petitioner "of the consequences of a plea" and that he would now on behalf of Petitioner "like to withdraw the plea of not guilty" as to Count II and "enter a plea of guilty" to said Count. The following then ensued (A. 7-8):

"The Court: Is that satisfactory to the government?

Mr. Hughes [for the Government]: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until a plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indctment; is that true?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant McCarthy: Yes, your Honor.

The Court You understand you may be fined in an amount not in excess of $10,000?

Defendant McCarthy: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant McCarthy: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant McCarthy: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

Defendant McCarthy: I beg your pardon?

The Court: Has anybody threatened you to enter a plea of guilty?

Defendant McCarthy: That's right, of my own volition, your Honor.

The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand.

Mr. Sokol: Thank you very much."

The District Judge never personally questioned Petitioner as to his understanding of the nature of the crime charged against him. Retained counsel for Petitioner was never asked if he had informed his client of the nature of the charge, nor did counsel volunteer such a statement (A. 7-8).

Without any further questioning, the Trial Judge accepted the Plea of Guilty to Count II and entered a finding of Guilty. The Court then dismissed Counts I and III and ordered a Pre-Sentence Investigation. The matter was set for September 14, 1966 for sentencing (A. 8).

Petitioner's third and last appearance was on September 14, 1966, the day he was sentenced. The Clerk called the case for "disposition report" on Count II, Government counsel (Mr. Galbraith) greeted the Court and immediately the following ensued (A. 9-10):

> "The Court: Mr. McCarthy, do you have anything to say prior to the time that sentence is imposed?
>
> Defendant McCarthy: I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry.
>
> The Court: And you, Mr. Sokol, on his behalf, have you something to say?
>
> Mr Sokol: Only this, if the Court please; I am quite aware of the fact that there has been a very thorough pre-sentence investigation made in this case. I talked to the probation officer and we have been given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his histor—and he has heard a good deal from me with respect to some of these mistakes —I don't know truly what I could add except to indicate that he is completely contrite.
>
> The Court: And you, Mr. Galbraith?
>
> Mr. Galbraith: Your Honor, only to this extent, as you probably recall, this was originally a three Count indictment in which the government moved to dismiss Counts 1 and 3 at the time that the defendant pled to Count 2. *The prime consideration of the*

was an understanding between the parties that all taxes, penalties and interest would be paid and I just would ask your Honor if you would incorporate some reference to that in the disposition of the matter.

Mr. Sokol: There has never been any disposition to avoid such a consequence.

The Court: I mean, the report indicates that he has ample assets for the government to attach, much in excess of the amount of owed taxes. *Well, I think that with the amount involved here that the deterrent effect of a sentence is desirable.* Because of that, the defendant will be sentenced to the custody of the Attorney General for one year and fined $2500."

Thereupon, Petitioner's counsel moved that the sentence be suspended and asked to be heard. The Court replied, "I will be happy to hear you". Counsel then spoke of the wrecking of Petitioner's physical health attendant upon a number of problems relating to his addiction to alcohol; his age of 65; his fine family he had been able to rear with the help of his wife; the help he had sought (Alcoholics Anonymous, A. 14) in order to overcome "a very, very serious physical and psychological problem" (A. 11). Counsel stated that he had supplied Mr. Sanculius (the probation officer) with "attestations of the facts" relating to Petitioner's "serious psychological problems". Thereupon the following ensued (A. 11):

"Mr. Sokol: With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

Mr. Sokol: I am sorry, your Honor, I did not hear the beginning.

The Court: I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. *In my opinion the manner in which the books were kept was not inadvertent.*"

As indicated, the Court, after making the foregoing statement, did not inquire of Petitioner about the subject. In fact, the Court did not address him at this or at any further part of the Proceeding. Counsel then observed (A. 12):

"Mr. Sokol: Your Honor, it had no reference to taxation. I would like to be heard on that, because we went into this in considerable detail."

Counsel thereupon spoke (A. 12-13) of Petitioner's neglectful method of bookkeeping, that there was nothing devious about it; that "when the investigation commenced, it zeroed in"; that "disclosure was made from the very, very first"; that at the time Petitioner "had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks"; that his family didn't feel that Petitioner could look out for himself; that his wife said that he would have to put himself under the jurisdiction of his brother; that Petitioner resented being treated like a little boy, and put money in a wrong bank account. Petitioner's counsel then added, "But there was never *any disposition* to deprive the United States of its due"; that Petitioner "has never acted actually in what you would call normal consequence",—that if he did, it was "like a little boy" (A. 13).

The following then ensued (A. 13):

"Mr. Sokol: Your Honor, at the age of sixty-five, particularly with this kind of situation, I am positive with all of the help that he has sought and with the—he is actually now—he is no longer his own prisoner, but he is, I think, very, very much confined in terms of the kinds of help he has sought out and I would most entreat your Honor to give him an opportunity to prove to himself as well as to the Court that the remaining years of his life can be acted out in an adult fashion rather than in the little boy behavior that has tended so much of his conduct.

The Court: I mean, if you are still a little boy at the age of sixty-six, why, there is not much time to prove whether you can become an adult.

Mr. Sokol: Your Honor, there is always something to save. If I were ninety years old and they told me I had ten days left, I would want to make those ten days something healthy rather than something sick.

The Court: Anything further?

Mr. Sokol: No, your Honor."

At this point, the probation officer requested an audience (A. 13). It was brief (A. 14):

"Officer Sanculius: Your Honor, may I say a word.

The Court Yes, Officer.

Officer Sanculius: Your Honor, I just wondered whether you had received the additional—.

The Court: Even if he had not got that pardon anything that happened that long ago *has no bearing on what I have done.*

Officer Sanculius: The other thing I had in mind, your Honor, is that I have verification that he has been attending the AA group for the past two months and his sponsor is here in Court to verify that if necessary.

The Court: Well, I assume that is unquestionably true. *I have known people to get in and out of that club, about every six months. They become a member and cease to be a member and then they become a member.*"

Petitioner's counsel then requested that the Court "try" Petitioner, that "perhaps he can indicate to the Court how much he wants to make good", to which the Court replied that he was "sure that he does"; that every one "confronted" as Petitioner here "has that desire" (A. 14). The following then ensued (A. 14-15):

"Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please. *I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage.* But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took plave over a series of four years, didn't it, Counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, *I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.*"

Other than the stay-of-execution colloquy (A. 16), the following concluded the hearing (A. 15-16):

"Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric

problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accomplie. There is no aspect of his existence right now where he has not said, 'I am wrong and I need guidance and I will do what somebody else says.'

So whether it relates to the matter of drinking, he is with AA; if it relates to the matter of religious discipline, he has put himself very, very closely on a day to day and week to week responsibility arrangement.

Mrs. McCarthy is here and can testify to the fact that the idea of accountability is very, very much more in his picture. The big thing, I think, is that so far as accountability to his government is concerned, *that before this indictment took place,* he had already put himself into Mr. Angram's hands. It was through Mr. Angram that a number of these things were crystallized, and they were submitted.

The Court: *All right, the sentence heretofore entered is not vacated;* a year in the custody of the Attorney General and $2,500 fine."

SUMMARY OF ARGUMENT.

Certain facts appear from the record which are beyond dispute. These facts the Government has not, and indeed cannot, put in issue.

(1) The Petitioner was never personally questioned by the Trial Judge as to Petitioner's understanding of the crime charged against him.

(2) Petitioner's counsel was never asked if he had informed his client of the nature of the charge, nor did counsel volunteer such a statement.

Rule 11 of the Federal Rules of Criminal Procedure requires that the Trial Judge address the defendant personally and determine that the plea is made with understanding of the nature of the charge. The state of the facts as of July 15, 1966, the date on which the plea was offered and accepted, is uncontroverted. From these facts, it is crystal clear that the Trial Judge did not follow the procedure set down in Rule 11.

The Judge did not, prior to accepting the plea, nor at any other time, question the Petitioner personally and determine that Petitioner understood the charge.

In short, if Rule 11 means what it says, this conviction should be reversed.

Rule 11 was violated in another respect. The Rule, as amended, also requires the District Court to determine that a *factual basis* exists for the *plea*. This Amendment is one more facet of the District Court's duty carefully to inquire into the facts *behind* a guilty plea. In the present case, the Petitioner, in his last words to the Court before

being sentenced, said, "It is not deliberate." Petitioner's counsel then said the conduct was gross negligence which "becomes criminal." In spite of these clear signals of lack of criminal intent, the District Court made no further inquiry.

This state of facts as of September 14, 1966 the date on which Judgment was entered, is, again, clear and uncontroverted. From these additional facts, it is clear that the District Court again failed to follow the procedure set down in Rule 11. The Court, in spite of the warning signals, did not adequately determine that a *factual basis* existed for the *plea of guilty.*

The District Court's omissions in this case, moreover, not only fail to meet the requirements of Rule 11, but also amount to a violation of the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.

The Sixth Amendment requires that a defendant ". . . be informed of the nature and cause of the accusation . . ." In the present case, there is serious question whether the District Court communicated with the Petitioner so that the accused understood the nature of the accusation.

In addition, the Seventh Circuit appears to require the Petitioner to establish on appeal that he did not understand the charge and that he was prejudiced. This is contrary to the clear requirement that the Government must show that the *District Court* established Petitioner's personal understanding of the charge. This shifting of burden, if true, deprives Petitioner of his liberty without due process, contrary to the requirements of the Fifth Amendment.

ARGUMENT.

I.

THE DISTRICT COURT FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF RULE 11 IN ACCEPTING PETITIONER'S PLEA OF GUILTY.

A.

The Court Failed To Inquire Of Petitioner Personally Whether He Understood The Nature Of The Charge.

The Court accepted Petitioner's plea of guilty to Count II on July 15, 1966. It was a short and rather summary proceeding (A. 6-8).

Not a word in the record there shows any inquiry by the Court as to whether Petitioner understood the nature of the charge. Not a word even shows that Petitioner's counsel had informed him of its nature.

The Court only inquired whether Petitioner wanted to enter a plea of guilty in view of the fact that, by that plea, Petitioner was waiving his right to a jury and was subject to the statutory penalties, which the Court stated. The Court then asked Petitioner if, with such knowledge, he still persisted in his plea. Petitioner answered affirmatively. Thereupon the Court recited (A. 8):

> "The record will show that this defendant, after being advised of the consequences of his plea . . . persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding."

Nothing here about whether Petitioner had been advised of the *nature* of the *charge*—only of "the *consequences* of his *plea.*"

Thereupon the Court inquired as to Counts I and III. The Government moved to dismiss them, requesting the Court to ask whether any promises or threats were made. The Court addressed the question to Petitioner who replied in the negative, stating that the plea was entered "of my own volition". The Court then entered a pre-trial investigation order and the matter was continued (A. 8).

Rule 11 of the Federal Rules of Criminal Procedure in effect now and at the time of the acceptance of the plea of guilty and judgment thereon, provides as follows (italicized language added by Amendment effective July 1, 1966):

> "A defendant may plead not guilty, guilty or, with the consent of the Court, *nolo contendere.* The Court may refuse to accept a plea of guilty, and shall not accept *such* plea . . . without first *addressing the defendant personally* and determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plead or if the Court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*"

This Court's Advisory Committee on Criminal Rules, in drafting the Amendment, felt it necessary because:

> "The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small num-

> ber go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts."

Advisory Committee Notes, 18 USCA, Criminal Rule 11, 1967 Pocket Part, p. 133.

As the sentencing hearing of September 14, 1966 clearly indicates, the "prime consideration" for the plea of guilty to Count II and the dismissal of Counts I and III "was an understanding between the parties that all taxes, penalties and interest would be paid". After saying this, Government counsel asked the Court to make a reference to it "in the disposition of the matter". Thus in effect a bargain was reached. "Discussions" had been going on with the Government prior to the arraignment on April 14, 1966 (A. 4). *A fortiori*, it was the duty of the Court to address Petitioner personally, to make certain that Petitioner understood the nature of the charge and had not bargained away any of his rights in reaching an accord with his Government.

In speaking of the three changes made in the second sentence of Rule 11 by the Amendment, the Advisory Committee said:

> "The first change makes it clear that before accepting . . . a plea of guilty . . . the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change *expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge.* The reported cases reflect some confusion over this matter (citations omitted).

> "The third change in the second sentence adds the words 'and the consequences of his plea' to state what clearly is the law." (citations omitted). (Advisory Committee Notes, 18 USCA Criminal Rule 11, 1967 Pocket Part, p. 134.) (Italics ours).

In the present case, no amount of words or citation of authority can alter the simple, inescapable fact that the Court did not address the defendant personally "in the course of determining that the plea is made voluntarily *and with understanding of the nature of the charge*", as the second change in the Rule *expressly* required the Court to do.

When we come to the sentencing hearing of September 14, 1966, the Court asked Petitioner *one and only one* question before sentence was imposed: Did Petitioner have anything to say prior thereto? Petitioner replied:

> "I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and *it is not deliberate* and I am very sorry." (A. 9).

Without questioning Petitioner further, the Court asked Petitioner's counsel and Government counsel if they had "something to say". He received their brief replies, observed that because of "the amount involved here .... the deterrent effect of a sentence is desirable", and *immediately* fixed that sentence at one year and $2500.00 (A. 10). No one seemed particularly interested in Petitioner's plaintive plea about his health, his addiction, and that what he had done was "not deliberate". It evoked no inquiry by the Court.

The colloquy that followed the motion of Petitioner's counsel to suspend the sentence (A. 10-15) raised many

questions of Petitioner's criminal intent necessary to sustain the charge: "There was never any disposition to deprive the United States of its due"; Petitioner's "neglectful method of bookkeeping", which the Court said "was not *inadvertent*" (did this make it criminal); and particularly the statement of Petitioner's counsel that Petitioner "did not act in contemplation of avoiding taxation", but that his acts were "gross neglect and criminal neglect", that he (counsel) would not have pleaded Petitioner guilty if he "did not feel that neglect has become criminal when it reaches a certain state". (A. 14). Might not counsel have been mistaken? On whom lay the duty to determine criminality? What was the purpose of the Amendment if not to protect a defendant from the good-faith errors of his counsel?

But the Court was unmoved by all of this. Not only did he fail to address Petitioner about anything on the motion to suspend the sentence, he refused an earnest entreaty of his counsel to hear Petitioner and his wife, gave short shrift to Probation Officer Sanculius, and refused to hear Petitioner's AA sponsor whom Officer Sanculius had brought to Court.

Opinion of Court of Appeals

The Court of Appeals said three issues were raised (A. 19-20):

> (1) "[W]hether the plea of guilty was accepted in accordance with rule 11 of the Federal Rules of Criminal Procedure";
>
> (2) "[W]hether the court abused its discretion in entering judgment after it allegedly knew or should have known that defendant did not understand the nature of the charge";

(3) "[W]hether the court denied defendant his rights under the fifth and sixth amendments to the constitution by entering judgment without any basis for a determination that the defendant understood the nature of the charge."

The Court of Appeals, after mentioning the indictment charges and the arraignment of April 14, 1966, then quoted almost *verbatim* (A. 20-22) the hearing of July 15, 1966, at which the plea of guilty to Count II was accepted (A. 22). Citing its own cases (*Rizzo* and *Lowe*), decided *before* the Amendment, it held that the District Court had "satisfied the requirements" of Rule 11 as amended, stating that it was "clear the district judge . . . had these recent changes in mind as the contents of his remarks and questions to defendant indicated" (A. 22).

The Court of Appeals arrived at this conclusion after paraphrasing Petitioner's argument as to the effect of the three changes in Rule 11 thusly (A. 22):

> "First, they say that a judge is now *required* to address the defendant *personally*. Secondly, they say a judge is now required to 'determine from his personal interrogation of defendant that he understands the consequences of the plea', and thirdly the court must determine that there is a factual basis for the plea."

But Petitioner's Brief directly quoted the Advisory Committee Notes (CCA Brief 12-13) (again quoted in this Brief, *ante*, pp. 15-17) and *specifically stated and argued* that the District Court "Failed To Personally Address Defendant To Determine If He Understood The Nature Of The Charge" (CCA Brief 19).

In a case such as this, where *not one question was addressed to Petitioner by the District Court* (or anyone else) before (or *even after*) the acceptance of the plea, *inquiring as to Petitioner's personal knowledge of the nature of*

the charge, we have difficulty discerning the record basis for the "clear" conclusion drawn by the Court of Appeals, to the effect that the District Court "had these recent changes in mind," at the time he accepted the plea.

The More Persuasive Authorities Support Petitioner's Position As To The Meaning Of Rule 11.

The question here is whether Rule 11 means what it says. The Seventh Circuit interprets Rule 11 as though it had been further amended by the words "but not when there is competent counsel present". We draw this from its concluding observation (A. 26):

> "We make the general observation that defendant was represented by *retained competent counsel, who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty.* See *United States* v. *Hetherington,* 7 Cir. 279 F. 2d 792 (1966)." (Italics ours)

The question is not what counsel understood; it is what Petitioner understood. Rule 11 must be followed whether the defendant is represented by retained counsel, *United States* v. *Davis,* 212 F. 2d 264 (C.A. 7, 1954), represented by Court-appointed counsel, *Kadwell* v. *United States,* 315 F. 2d 667 (C.A. 9, 1963), or waives counsel, *Heiden* v. *United States,* 353 F. 2d 53 (C.A. 9, 1965). *Halliday* v. *United States,* 380 F. 2d 270 (C.A. 1, 1967) considered this point at some length. The Court said, at p. 272:

> "The Government cites no case holding that the facts that the defendant had heard the Indictment and certain testimony, and was represented by counsel, in themselves form a sufficient basis for the requisite findings. Something more is needed. See *Domenica* v. *United States,* 1 Cir., 1961, 292 F. 2d 483; *Gundlach* v. *United States,* 4 Cir., 1958, 262 F. 2d 72, Cert. denied 360 U.S. 904, 79 S. Ct. 1283, 3 L. Ed. 2d 1255. *To the extent that United States* v. *Hetherington,* 7

Cir., 1960, 279 F. 2d 792, Cert. denied, 364 U.S. 908, 81 S. Ct. 271, 5 L. Ed. 2d 224, *may be thought to suggest the contrary, we disagree.* We may concede that there was nothing to indicate that the defendant *was not* acting voluntarily and with full understanding. This did not satisfy the rule. *The rule imposed a burden of inquiry, Julian* v. *United States,* 6 Cir., 1956, 236 F. 2d 155. Although the circumstances suggested no negative finding, they did not warrant an affirmative one." (Italics ours)

The Seventh Circuit cited *Hetherington* as controlling the present case (A. 26), but *Halliday* expressly rejected *Hetherington's* rationale. *Halliday* specifically held that Rule 11, even prior to the 1966 Amendment, imposed a *duty of inquiry* upon the District Court. The Sixth Circuit reached the same conclusion as to a duty of inquiry in *Fultz* v. *United States,* 395 F. 2d 404 (C.A. 6, 1966).

Since the presence or absence of counsel is not controlling, what is determinative of the present case? Rule 11 furnishes the answer, namely, the District Court must question the defendant personally to establish his understanding of the nature of the charge.

The leading case is *Munich* v. *United States,* 337 F. 2d 356 (C.A. 9, 1964). It dealt with the duties of a District Court when accepting a plea of guilty. The case was considered by the Advisory Committee to be so important as to support the Amendment of Rule 11. It is a pre-Amendment Case; but, since the Amendment adopts its rule, the Case is authoritative.

The facts in *Munich* parallel those at bar on this critical issue. Munich was charged with violations of the narcotic law. He retained counsel, who entered a plea of not guilty to each of the eight counts in the Indictment. At a later hearing, while still represented by retained counsel, Mu-

nich withdrew his plea of not guilty and entered a plea of guilty. No appeal was taken. Eighteen months after the sentencing, a motion to vacate was filed. An appeal was taken from denial of that motion. The Ninth Circuit (sitting *en banc*) reversed the denial of the motion to vacate and remanded the case for trial. In so doing, it established clearly what duties the District Court had at the time of accepting a plea of guilty..

It held that there are two fact questions which the District Court must determine before accepting a guilty plea. First, the District Court must determine that the plea is made voluntarily; and second, *the District Court must determine that it is made with understanding of the nature of the charge.* The Ninth Circuit further held that three elements are necessary before the District Court can be satisfied that a Defendant understands the nature of the charge; namely, (1) the meaning of the charge, (2) what acts are necessary to establish guilt, and (3) the consequences of pleading guilty to the charge. (357 F. 2d 356, 359).

In *Munich,* the Defendant was directly asked if he understood the charge. The Defendant responded, "Yes, I do." (337 F. 2d 356, 360). The Ninth Circuit held that this interrogation was not enough. It also noted that the District Court did not ask Munich's retained counsel, who was present, whether he had advised his client of the nature of the charge. The Court held that, in the absence of any assurance from counsel, a defendant's affirmative answer that he understands the charge does not provide a substantial basis for a determination that the Defendant understands the meaning of the charge, what acts are necessary to establish guilt, and the consequences of pleading guilty.

In 1965, the Ninth Circuit reinforced its conclusion in *Munich* by holding in *Heiden* v. *United States*, 335 F. 2d 53 (C.A. 9, 1965), that the District Court's failure to ascertain a defendant's understanding at the time of accepting a guilty plea could not be cured by a subsequent hearing or by any subsequent colloquy between Court and defendant.

Here the District Court at no point questioned the Petitioner personally as to his understanding of the nature of the charge. This omission is startling in view of the facts which came to the Court's attention particularly when Petitioner, in his only personal statement to the Court, said (A. 9), ". . . *it is not deliberate* and I am very sorry". (Italics ours)

In the course of the proceedings, the District Court also learned that Petitioner was 65 years old (A. 12). He learned that Petitioner suffered from alcoholism at the time of the offense and up to the time of entering the plea (A. 12). He learned that the Government's theory of the case was complex and that the explanation of that theory by Petitioner's counsel was even more involved (A. 12-15).

These were all warning signals, pointing up the absolute necessity of further inquiry. Yet the District Court failed to inquire further. The record in this case contains nothing which shows personal questioning of the Petitioner by the District Court (or anyone else) to establish his understanding of the nature of the charge.

B.

The Court Failed Adequately To Satisfy Itself That There Was A Factual Basis For Petitioner's Plea.

Here we speak of the last sentence of Rule 11, which was added by the Amendment and mandatorily requires that *"The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."* (A. 31). Concerning the purpose of this Amendment, the Advisory Committee said (Notes, 18 USCA, Criminal Rule 11, 1967, Pocket Part, p. 134):

> "The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g. protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

As the Notes indicate, this is an additional safeguard, for a defendant might understand the nature of the charge without realizing that his conduct came within it. Alternative methods of court inquiry are suggested by the Notes, but nothing indicates that one form is necessarily sufficient. The Court of Appeals laid great stress here upon the pre-sentence investigation report (A. 25-26). In view of the record in this case, is that enough?

The Indictment charged violations of Section 7201 of the Internal Revenue Code (A. 31). Count II alleged that the additional tax due was $5,143.70 for 1960. Under Section 7201 three elements are essential to conviction: (1)

an affirmative act constitutes an evasion or attempted evasion of the tax; (2) the existence of a tax deficiency; (3) wilfulness.

Within Section 7201, however, are at least two included offenses, namely, filing a false tax return and failing to pay a tax when due, both of which are misdemeanors. Noting the situation, this Court recently defined the crime under Section 7201 in *Sansone* v. *United States,* 380 U.S. 343 (1965) where it held that the distinguishing characteristic of Section 7201 is a wilful attempt to evade or defeat taxes. It is therefore important to note that the crime under Section 7201 demands a *specific intent.*

Clearly the charge with which the defendant was faced is a complicated one. It is in fact the "capstone" of this body of law. The possibility of confusion with lesser included offenses is great. We must therefore look carefully at what Petitioner said. The only statement made in Court by Petitioner occurred at the sentencing hearing when he said (A. 9) ". . . it is not deliberate".

The legal force of a statement such as "It is not deliberate" is not clear. But that is the whole point. Such a statement is totally inconsistent with a plea of guilty to a *specific intent crime.* Such a statement demands further inquiry. It cannot go unnoticed. Yet no inquiry was made.

Fundamental principles of criminal jurisprudence militate against the conviction of an accused for a felony based on inadvertence. In the area of taxation, the case of *United States* v. *Pechenik,* 236 F. 2d 844 (C.A. 3, 1956) defines the law as follows:

"• • • The conscious purpose to defraud proscribed by the statute does not include negligence, careless-

ness, misunderstanding or unintentional understatement of income. *Holland* v. *United States,* 1954, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150; *United States* v. *Murdock,* 1933, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381. As was said in the latter case (290 U.S. at page 396, 54 S. Ct. at page 226):

> 'Congress did not intend that a person, by reason of a bonafide misunderstanding as to his liability for the tax * * * or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.'" 236 F. 2d 844, 846.

These fundamental principles of criminal jurisprudence apply equally whether the offense is in the area of taxation or elsewhere. The procedures for pleas of guilty before military tribunals closely parallel the Federal Rules of Criminal Procedure. And the decisions thereunder follow the same rationale. In the case of *United States* v. *Richardson,* 15 USCMA 400, 35 CMR 372, 375-376 (1965), the defendant was charged with passing checks without funds to cover. The defendant pleaded guilty and was sentenced. Later, while conferring with a legal officer, the defendant said he had deposited checks which he had won at gambling. Those checks were dishonored. As a result, the other checks were returnd NSF. This, like Petitioner's "it was not deliberate" in the present case, went directly to the *mental state necessary to the crime charged.* The defendant there took an appeal. The Court of Military Appeals said:

> "Particularly do we advert to the fact (that) accused's plea in this case was met only with the president's barren recital of a pro forma explanation of its meaning and effect. And, the stipulations of fact into which counsel entered were, as the reviewer noted, insufficient to make out even a prima facie case of guilt * * *

we have no recourse but to conclude the circumstances require the plea to be set aside.

* * * * *

"We cannot leave this matter without referring once more to the desirability of having a full inquiry made at the trial into the circumstances of the accused's plea in order to insure he understands its legal and factual significance * * * The reliance on nothing more than a formula, the skimpy record, and the lack of any real attention to his declarations leads instead to reversal."

Counsel for Petitioner, in interpreting the acts and omissions of Petitioner said:

"Mr. Sokol: He [Petitioner] did not act in contemplation of avoiding taxation. That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please.

I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took place over a series of four years, didn't it counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years." (A. 14-15)

Comparing the statement of counsel (A. 14-15) with the statement of Petitioner (A. 9), and with the law applicable to the crime charged, it is impossible to determine of what Petitioner conceived himself to be guilty.

Was it really enough, in determining whether there was a *factual basis* for the plea to a *specific intent* crime, that the District Court had read the pre-sentence report, strongly relied on by the Court of Appeals, however thorough it may have been? Didn't that report in fact raise more questions than it settled as regards the supposed factual basis for Petitioner's plea? Isn't it true that the report (taken together with Petitioner's "it was not deliberate" and the extended plea by Petitioner's counsel for a suspended sentence) raised a specific issue whether there was indeed a factual basis for a plea of guilty? Should not the Court have inquired further?

It is in cases such as this, where the charge is complex, that close adherence to procedural rights is most important. Recognizing this duty, Judge Parsons, District Judge for the Northern District of Illinois, in *Cerniglia* v. *United States*, 234 F. Supp. 932, 945, said:

> "• • • The extent to which a Court must inquire as to the *factual basis* for a plea of guilty will vary from case to case. In cases where the charge involves *complicated facts*, such as conspiracy in a scheme to defraud a bank, *the Judge should inquire further to determine whether the defendant, in conversation with his attorney, had discussed possible factual and technical defenses, e.g.*, Statute of Limitations • • •" (Italics ours)

In many respects the zeal with which a Court adheres to regulations imposed for the safeguarding of fundamental rights determines the total quality of justice throughout a society. In a period when great pressures are brought to bear upon the District Court to speed up the processing of cases, close and careful adherence

to procedural rules in criminal cases may create problems; but formalities constructed by recognized rules for the protection of Constitutional rights are substantial and indispensable. In this regard, "delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure." *Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, 268 (1936).

II.

THE DISTRICT COURT'S JUDGMENT OF CONVICTION, MOREOVER, VIOLATES PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

A. The Sixth Amendment

The Sixth Amendment requires that a defendant ". . . be informed of the nature and cause of the accusation". (A. 30). In the present case, there is absolutely no indication in the record that Petitioner was ever personally informed of the nature of the charge against him. This violates Petitioner's rights, under both the Fifth and Sixth Amendments.

On a number of occasions this Court has been faced with the question of whether or not Sixth Amendment guarantees are a part of the due process protection. The uniform result, on the question of the right of an accused to know the charge, is that the most fundamental element of due process is ". . . real notice of the true nature of the charge against him . . ." *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941).

In the present case, the Seventh Circuit refers to the Constitutional argument but does not answer or decide it

(A. 20). The Seventh Circuit seems to believe that this is obviated by the fact that Petitioner had counsel and by the fact that the District Court read the pre-sentence investigation report.

However, the presence or absence of counsel has nothing to do with the error which occurred when the guilty plea was tendered and accepted. No matter how competent and knowledgeable Petitioner's counsel was, his knowledge and understanding are not the point. It is the knowledge and understanding of Petitioner, the accused, which is the critical question.

Moreover, the District Court's perusal of the pre-sentence report cannot cure the defect. Error occurred when the plea was tendered and accepted. At that point, the District Court had *not* established Petitioner's personal understanding of the charge. Nothing that happened thereafter could cure that defect. The pre-sentence report, taken together with Petitioner's "it was not deliberate," actually *compounded* the error.

The case of *Hulsey* v. *U. S.*, 369 F. 2d 284 (C.A. 5, 1966), presents a situation similar to the instant appeal. In that case an admitted alcoholic was charged with the interstate transportation of forged securities with fraudulent intent. The defendant pleaded guilty to endorsing the securities; and, upon questioning by the Judge, stated that he recognized the endorsement as his own but could not remember whether the securities in question were forged or not because he had been drinking heavily and could not account for his behavior. The Trial Court accepted the plea, entered judgment, and sentenced the defendant. An appeal was perfected. The Court of Appeals reversed the decision and stated:

"Pleading guilty to the mere endorsement of an instrument, while disclaiming any knowledge of whether it was forged, even aided by the strongest presumption of appellant's comprehension of the offense charged, cannot be viewed as tantamount to an unconditional assertion of guilt to the fraudulent interstate transportation of a forged security with knowledge of the forgery. If anything, such response appears more closely akin to a protestation of innocence than an expression of guilt. It would have been a simple matter for the trial court, when confronted with such equivocal response, to delay accepting the plea until further inquiry clearly established that the accused understood the elements of the crime charged in the information and was willing to enter an unequivocal admission of guilt. See *Kreuter* v. *United States,* 10th Cir. 1952, 201 F. 2d 33. On the other hand, if after being fully apprised of the nature of the charge and the consequences of his plea, the accused persisted in attempting to enter a qualified plea, the trial court should have refused to accept it and set the case for trial. *State* v. *Stacy,* 1953, 43 Wash. 2d 358, 261 P. 2d 400; *People* v. *Morrison,* 1957, 348 Mich. 88, 81 N.W. 2d 667, cf. *Bergen* v. *United States,* 8th Cir., 1944, 145 F. 2d 181. Nothing we have said is intended to suggest that the acceptance of a plea of guilty which merely fails to comply with precise ceremonial or verbal formality will necessitate the setting aside of an otherwise valid conviction and sentence. See *United States* v. *Cariola,* 8th Cir., 1949, 177 F. 2d 505. We are convinced, however, that a fundamental requisite of a plea of guilty is that it manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if so limited or conditioned that it constitutes, as in the instant case, little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence. To require that a plea of guilty

which, when accepted by the court, in itself constitutes a conviction no less conclusive than the verdict of a jury, must manifest an unqualified admission of the offense charged, is not to exalt form over substance nor to place a premium upon mere technical verbiage; it is merely to implement a fundamental requirement of due process essential to the fair and just administration of the criminal laws. 369 F. 2d 284, 287."

B. The Fifth Amendment

The Seventh Circuit appears to require the Petitioner to prove that he did not understand the charge against him. This is contrary to the clear requirement of Rule 11, namely, that the Court must establish Petitioner's personal understanding of the charge. And, on the Appeal to the Seventh Circuit, the burden was on the Government to show that the Court had done this. The Seventh Circuit's statement seems to shift this burden to Petitioner. Neither precedent nor public policy can be shown to require that Petitioner shoulder that burden. Indeed, if Petitioner must lift that bale, the Sixth Amendment guarantee means nothing. If Petitioner is put to such a task, particularly in view of the District Court's non-compliance with Rule 11, then the presumption of innocence is reversed.

CONCLUSION.

Rule 11, as amended effective July 1, 1966, is like a compass on a boat. In this vital area of acceptance of a plea of guilty, it points the course to "equal justice to all in the federal courts". If variations or deviations result from vague and fluid phrases such as "the district court *satisfied* the requirements" of the rule of "reasoning in *substantial* accord . . ." therewith (A. 23), dead-reckoning determines our course and the vagaries of the sea and of the man at the helm determine our destination.

We have lately come to appreciate the wisdom of our ancestors, particularly in the field of the administration of criminal justice. Indeed, it would be superfluous to marshall the recent landmark cases involving procedure, too long treated as gossamer: "mere technicalities", "matters of form". For over seven centuries prior to the dawn of this "enlightened" one, remedies breathe life into rights.

And while, as Holmes put it, the seventeenth century common law had been unable "to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert" (*Paraiso v. United States*, 207 U.S. 368, 372, Harlan J. dissents), the paramount truism is that *"The history of liberty has largely been the history of observance of procedural safeguards"*, (per Frankfurter, J. in *McNabb v. United States*, 318 U.S 332, 347). The learned Justice added immediately in concluding (*id.*, at p. 347):

"And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law".

For after all is written and said, the District Court did not address Petitioner *personally* to determine if Petitioner's plea was made *"with understanding of the nature of the charge"*, either before or after accepting Petitioner's plea.

Only by abiding by the letter of Rule 11, can you give its spirit life. That spirit was to lay at rest for all future time the gnawing feeling that defendants in the past had pleaded guilty without really "understanding the nature of the charge"; or, in more blunt terms, whether they knew they were in fact legally guilty.

Because of the premises, it is respectfully submitted that the judgment be reversed and the cause remanded for further proceedings conformably to law.

Respectfully submitted,

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INDEX

CITATIONS

Cases—Continued

Constitution, statutes, and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 43

WILLIAM J. McCARTHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 19–27) is reported at 387 F. 2d 838.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1968. A petition for rehearing was denied on February 5, 1968 (App. 28). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until March 11, 1968. The petition was filed on March 7, 1968, and was granted on April 29, 1968 (390 U.S. 1038). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record shows that petitioner's plea of guilty was entered voluntarily, with knowledge of the nature of the charge and the consequences of the plea, and contains sufficient assurances that a factual basis existed for the guilty plea.

2. Whether the district court complied with Rule 11, F.R. Crim. P., in accepting petitioner's guilty plea.

3. Whether, if the trial judge is found to have failed technically to comply with Rule 11, the judgment of conviction should be vacated, or the case remanded for a hearing on whether the guilty plea was voluntarily and knowingly entered.

RULE INVOLVED

Rule 11, F.R. Crim. P., provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT

On April 1, 1966, a three-count indictment was returned in the United States District Court for the Northern District of Illinois charging that petitioner willfully attempted to evade income taxes for the calendar years 1959, 1960 and 1961 by filing fraudulent returns (which understated his income by approximately $3,000, $13,000, and $6,000, respectively) in violation of 26 U.S.C. 7201 (App. 2–3). On April 14, petitioner, represented by retained counsel, entered a plea of not guilty to all counts, and trial was set for June. At a hearing on June 29, the court postponed trial because of petitioner's illness. The court asked government counsel how long the trial would take, and he replied, "Well, it is anticipated the matter will not go to trial, according to counsel" (App. 5). A new trial date was set for July 15 (App. 5).

On July 15, petitioner's counsel moved to withdraw the plea of not guilty as to count 2, and to enter a plea of guilty to that count. Counsel referred to the matter as "a tax fraud case" (App. 6), and told the court that he had advised petitioner of the consequences of the guilty plea (App. 7). Government counsel stated that he did not oppose the change of plea and would move to dismiss the remaining counts. The court noted that a "tax evasion" charge was involved, and then discussed the plea with petitioner. Petitioner assured the court that he understood that the maximum penalty was five years' imprisonment and a $10,000 fine; that he was aware that the plea constituted a waiver of jury trial; and that he was making the plea voluntarily without any promises or threats. When asked about the latter, petitioner answered that he was pleading guilty "of my own volition, your Honor." Obviously satisfied

with petitioner's expression of awareness of his action, the court accepted the guilty plea and ordered a pre-sentence investigation (App. 7–8).

On September 14, petitioner appeared for sentencing. Prior to pronouncing sentence, the court asked if petitioner had anything to say. Petitioner replied that he was sorry that this situation had arisen and blamed it on "my health and the things that I have gone through," and further stated that "it is not deliberate and I am very sorry" (App. 9). Defense counsel then spoke on petitioner's behalf, noting that "there has been a very thorough pre-sentence investigation made in this case," and that "we have been given an opportunity to submit a good deal of material to [the probation officer] and I am satisfied that the Court has had an opportunity to examine it" (App. 9–10). Counsel indicated that he could add little to the extensive report of the probation officer except that petitioner was contrite (App. 10). Government counsel requested that the court incorporate in its sentence the parties' understanding that the taxes owed by petitioner, along with the related penalties, would be paid. Defense counsel noted that petitioner was aware of his obligation to pay the arrears, and the court observed that he had more than sufficient assets to cover the amount owed. The court then imposed a sentence of imprisonment for one year and a $2500 fine, remarking that, in view of the substantial amount of taxes involved, "the deterrent effect of a sentence is desirable" (App. 10).

The balance of the sentencing hearing was devoted to a discussion of defense counsel's motion that peti-

tioner's sentence be suspended. Counsel noted that petitioner was 65 years old, that he had overcome a drinking problem and had psychological difficulties. He said that after the tax investigation started, petitioner freely answered all questions of the investigator (App. 10–11). The court noted that petitioner's books were in such shape that it was difficult to determine what was owing, and stated that "the manner in which the books were kept was not inadvertent" (App. 11). Counsel urged that this was due to petitioner's general pattern of gross neglect (App. 13–14). He said (App. 14):

> I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return.

The court noted that the acts had taken place over a four-year period and suggested that, if the government had not stepped in, the pattern would have continued for eight years (App. 15). Counsel replied that "before this indictment" petitioner had consulted counsel about his accountability to the government (*ibid.*). The court declined to suspend the sentence previously pronounced (App. 16).

Nine days after sentencing, petitioner, represented by new counsel, filed his notice of appeal (App. 18). In his argument to the Seventh Circuit, petitioner claimed that the district court had failed to make a proper inquiry pursuant to Rule 11, F.R. Crim. P.,

and that the court had abused its discretion in accepting his guilty plea without assurance that petitioner understood the nature of the charge. In addition, petitioner argued that the judgment of conviction was entered without determining that a factual basis existed for the plea. Finally, petitioner contended that his rights under the Fifth and Sixth Amendments were denied by the court's entry of judgment on his plea without determining that he comprehended the charge against him (see App. 19–20). The court of appeals affirmed the conviction (App. 19–27, 28).

SUMMARY OF ARGUMENT

I

Considering the instant record as a whole, it cannot seriously be doubted that petitioner entered his plea of guilty voluntarily with full awareness of the nature of the charge and the consequences of the plea. Petitioner had a copy of the indictment two months before he pleaded guilty. He was charged in simple language with willfully attempting to evade the payment of taxes by filing a false return, knowing that the amount of earnings reported was less than the actual amount. From the time of indictment petitioner was represented by able and experienced counsel, who engaged in numerous conferences with petitioner, apparently over the issue of willfulness, since his tax liability was never publicly disputed. The statements of petitioner and his counsel at the hearings where the plea was entered and where sentence was imposed demonstrate petitioner's complete understanding of the nature of the proceedings. In the context of these hearings,

nothing uttered by petitioner can properly be viewed as a signal that he did not comprehend the nature of the charge against him.

Petitioner's extensive reliance on a single phrase—"it is not deliberate"—in a statement made just prior to sentencing, and some two months after he had pleaded guilty, is misplaced. The statement does not show that petitioner either was unaware that willfulness was an essential element of the offense to which he had pleaded guilty or was in fact not guilty of that offense. Rather, it was part of a typical expression of contrition by a convicted defendant, presumably designed to secure leniency from the sentencing judge.

II

The inquiry conducted by the trial judge at the time petitioner entered his plea of guilty was in substantial compliance with Rule 11, as amended in 1966. In the first place, Rule 11 does not purport to prescribe a precise formula to be utilized in satisfying its general requirements. Instead, it preserves a desirable degree of flexibility and discretion for trial judges in this regard. And, although the judge could have made a more searching inquiry into petitioner's understanding of the nature of the charge, the fact that he did not must be considered in context. Petitioner was an intelligent businessman who was represented by experienced counsel, and who had discussed pleading guilty weeks before the plea was entered. When, therefore, petitioner persisted in his plea during the court's questioning, there was no reason, considering all the circumstances, for further elaboration.

Moreover, as previously stated, nothing occurred before the sentence was imposed to give the court reason to believe that the plea was not entered with knowledge of the nature of the charge.

III

Even if the trial judge's inquiry could be viewed as technically defective under Rule 11, petitioner is not automatically entitled to have the judgment of conviction set aside. Rather, the ultimate question here presented is actually whether the plea was in fact entered voluntarily and knowingly. If this Court should decide, therefore, that the record shows noncompliance with Rule 11 and does not affirmatively show that the plea was voluntary and knowing, a hearing in the district court should be ordered to resolve this issue. That result would be particularly appropriate here, since petitioner never gave the trial court an opportunity, by way of a motion to withdraw the plea under Rule 32(d), to consider his challenge to the sufficiency of the procedure followed under Rule 11.

ARGUMENT

I. THE RECORD AS A WHOLE LEAVES NO DOUBT THAT PETITIONER'S GUILTY PLEA WAS VOLUNTARILY ENTERED WITH FULL KNOWLEDGE OF THE OFFENSE WITH WHICH HE WAS CHARGED AND THE CONSEQUENCES OF HIS PLEA

Considering the instant record as a whole, there can be no doubt, we submit, that petitioner's guilty plea was in fact voluntarily made, with full knowledge of the nature of the offense with which he was charged and the consequences of his plea. Accordingly, the

judgment of conviction was properly entered upon the basis of that plea, and the court of appeals correctly affirmed. Indeed, it appears that petitioner's attack on his conviction stems primarily from his disappointment with his sentence—*i.e.*, he was given a prison term which the trial judge refused to suspend.[1] Thus, petitioner's present contentions appear to be, in the words of the court below, "appellate proceeding afterthought[s]" (App. 24) skillfully developed by new counsel.

Even before indictment, petitioner had consulted with counsel regarding his tax liability, according to the attorney who represented him in the district court (App. 15).[2] From the time of indictment, more than two months before he pleaded guilty, petitioner was represented by Mr. Sokol, a former Assistant United States Attorney and an experienced practitioner. The indictment charged in simple language that petitioner willfully attempted to evade the payment of taxes for three different years by filing false returns knowing that the amounts of earnings reported were substantially less than the actual amounts. Petitioner therefore knew exactly the nature of the crimes of which he was accused.

The question whether petitioner would plead guilty had obviously been under discussion for some time

[1] Disappointment in a sentence is of course not a basis for setting aside a judgment on a plea of guilty. See *Miles* v. *United States*, 385 F. 2d 541 (C.A. 10); *Vanater* v. *Boles*, 377 F. 2d 898 (C.A. 4); *White* v. *United States*, 354 F. 2d 22 (C.A. 9); *Kadwell* v. *United States*, 315 F. 2d 667, 670 (C.A. 9).

[2] It is reasonable to infer that this occurred after the government's investigation had commenced but before petitioner was indicted.

for, on June 29, more than two weeks before he entered his plea, government counsel indicated that a trial might not be necessary. Since petitioner's tax liability was never publicly disputed,[3] any discussions with respect to a plea between petitioner and his attorney necessarily related primarily to the element of willfulness, which would have presented the only real issue at the trial. Petitioner's counsel, in urging suspension of the sentence pronounced, showed that he had considered that issue extensively. While he phrased it to the court in terms of the neglect being so gross as to become criminal (App. 14),[4] he had obviously concluded that a defense of lack of willfulness could not be sustained, and had so advised his client.

When petitioner entered a plea of guilty to count 2, he gave no indication that he could not or did not comprehend the proceedings. Petitioner's counsel initially noted that the matter involved was "a tax fraud case" (App. 6), and the court shortly thereafter referred to the case as involving "tax evasion" (App. 7). In response to a series of questions which the court propounded directly to him, not to his counsel, petitioner

[3] Government counsel noted at sentencing that he had moved to dismiss counts 1 and 3 after the plea to count 2. He stated that the prime consideration "of that"—*i.e.*, dismissal of those two counts—was that all taxes, interest and penalties would be paid (App. 10). Petitioner's counsel said "[t]here has never been any disposition to avoid such a consequence," and the court noted that petitioner had ample assets from which to collect the amounts due (*ibid.*).

[4] Petitioner's counsel stated that he "could not have, in good conscience, recommended that [petitioner] go into a plea if [he] did not feel that neglect has become criminal when it reaches a certain stage" (App. 14; see *supra*, p. 5).

stated that it was true that he desired to plead guilty to count 2, that he recognized that the plea constituted a waiver of jury trial and could lead to incarceration for five years and a $10,000 fine, and that he entered the plea without threat or promise, of his "own volition" (App. 7–8).

For the next two months, petitioner made no attempt to withdraw the plea. Rather, he and his counsel provided the probation officer with all the information they thought would show whatever might be considered in mitigation of petitioner's conduct (App. 9–10). The probation report, by counsel's statement, reflected that petitioner and his counsel had been given "an opportunity to submit a good deal of material," and counsel stated that he was "satisfied that the Court has had an opportunity to examine it" (App. 9–10). No motion to withdraw the plea of guilty, on the ground that the facts so freely revealed did not show the offense of willfully failing to pay taxes, was ever filed or, indeed, so far as the record shows, ever contemplated.

Under these circumstances, petitioner's statement, when he was asked what he wished to say before the sentence was imposed—that "it [was] not deliberate" and would not have happened "if it were not for my health and things that I have gone through"—did not indicate that petitioner had not known that he was charged with acting willfully (App. 9).[5] To the con-

[5] Significantly, petitioner's present contentions do not focus extensively on the events of the day his plea was entered and accepted, but rather on four words in this statement he made some two months later, just before the imposition of sentence, as assertedly showing that he did not understand fraudulent

trary, that statement, viewed in context, constituted nothing more than the usual expression of contrition by a defendant who hoped for a lenient sentence. Even after the sentence was imposed, in arguing for suspension, petitioner's counsel admitted that the alleged "neglect" was so gross as to be in his mind criminal.

The trial judge had no reason to believe that on the matter of willfulness—the only possible issue in the criminal trial—counsel would not have advised his client, before the decision was made to enter a guilty plea, that the defense had no prospect of success. Moreover, the court had before it the facts in the pre-sentence report, and the judge obviously was convinced by those facts that petitioner's failure to pay taxes was not inadvertent and would have continued indefinitely if the government had not started an investigation.[6] In sum, the record here amply demonstrates that petitioner understood what he was charged with and the consequences of pleading guilty, and thus knowingly and voluntarily entered his guilty plea.

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intent to be an element of the crime charged (*e.g.*, Pet. Br. 17, 23, 25, 28, 30). However, as the court of appeals pointed out, "the critical date as to defendant's physical and mental being was July 15, 1966 when his plea of guilty was entered * * *" (App. 23)—not the earlier dates when he filed the tax returns or the later date when he was sentenced.

[6] Thus, the trial judge stated that, in his view, "the manner in which [petitioner's] books were kept was not inadvertent" (App. 11), and that, "if the government had not stepped in," petitioner's derelictions would have continued significantly longer (App. 15).

II. THE JUDGMENT OF CONVICTION WAS ENTERED IN COMPLIANCE WITH RULE 11

Rule 11, as amended in 1966, imposes two duties on the trial judge. It requires that, before accepting a plea of guilty, the court address the defendant personally to determine "that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." It then provides that the court should not enter a judgment upon a plea of guilty "unless it is satisfied that there is a factual basis for the plea." The notes of the advisory committee which drafted the amended rules make clear that this second requirement may be satisfied by a pre-sentence report.[7]

Here the trial judge, before accepting the plea of guilty, addressed petitioner personally to ascertain

[7] In pertinent part, the advisory committee notes relating to Rule 11 provide (18 U.S.C.A., F.R. Crim. P., Rule 11, 1967 pocket part, p. 134):

> A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. * * * The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

that the plea was voluntarily made with knowledge of the consequences. Moreover, the judge, before entering the judgment of conviction, satisfied himself on the basis of the pre-sentence report (see App. 25–26), that there was a factual basis for the plea.[8] As already discussed, the record shows that the judge was convinced that petitioner's evasion of taxes was deliberate (*e.g.*, App. 11).

It is claimed, however, that before accepting the plea the trial judge did not sufficiently inquire into the petitioner's understanding of the nature of the charge against him. Undoubtedly, the judge could have been more explicit in this respect. But Rule 11, quite obviously intentionally, does not prescribe the precise manner in which a district judge is to determine a defendant's understanding of the nature of the charge. Rather, it simply directs the judge to address the defendant personally and determine the voluntary and knowing nature of his guilty plea before accepting it. Rule 11 thus preserves a desirable degree of flexibility and discretion for trial judges as regards the most ef-

[8] Petitioner's extended argument to the contrary (Pet. Br. 24–29) is hinged primarily on his statement at the sentencing hearing that his actions were "not deliberate" (App. 9). As pointed out earlier (*supra*, pp. 11–12), however, petitioner's statement, taken as a whole, was simply an expression of contrition by an admittedly guilty defendant, and contained nothing that should have led the court to inquire further as to whether, some two months earlier, petitioner had understood the nature of the charge to which he then pleaded guilty and whether there was a factual basis for his plea. In view of the plain language of the indictment, and the judge's admonition that the charge carried serious felony penalties, petitioner's suggestion of possible confusion with lesser included offenses (Pet. Br. 25) is unacceptable (see App. 23–24).

fective way to proceed in satisfying the general requirements it establishes. *E.g., United States* v. *Lowe*, 367 F. 2d 44 (C.A. 7); see generally cases cited *infra*, pp. 18–19. Here the judge's approach was consistent with that flexibility and within the bounds of that discretion, and thus, as the court of appeals concluded, the district court "satisfied the requirements of [R]ule 11 * * * in accepting [petitioner's] plea of guilty" (App. 23).

Moreover, the adequacy of the trial judge's inquiry regarding petitioner's comprehension of the crime with which he was charged cannot be determined apart from its setting. The court was not dealing with a poor, ignorant defendant represented by counsel appointed for him shortly before arraignment. Rather, it was dealing with an established businessman of over 60 years of age with substantial assets who knew he was charged with having intentionally understated his income for the year in question by some $13,000. The judge knew that petitioner had been represented by experienced counsel ever since indictment,[9] and that there had been discussion of a plea of guilty more

[9] Contrary to petitioner's suggestion (Pet. Br. 20), the court of appeals did not read Rule 11 as not requiring the trial judge to address himself personally to a defendant represented by counsel. The court below did "make the general observation that [petitioner] was represented by retained competent counsel, who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty" (App. 26). Here the judge plainly did address petitioner personally before accepting his plea (see App. 7–8). And surely the presence of counsel and the fact that a defendant is acting upon the informed advice of such counsel are factors which can properly be considered by a reviewing court in determining whether Rule 11 has been complied with sufficiently. See *Munich* v. *United States*, 337 F. 2d 356, 359, n. 5 (C.A. 9).

than two weeks before the plea was entered. When, therefore, petitioner assured the court that he wanted to enter a plea to count 2, that he persisted in his plea despite knowledge of the consequences, and that he was entering the plea of his own volition, the court could properly assume that petitioner was entering that plea with a complete understanding of the charge against him.

All of the circumstances combined to provide the trial court with a sound basis for "*determining* that the plea [was] made voluntarily with understanding of the nature of the charge * * *," which is what Rule 11 requires (emphasis added). So long as this requirement was met, Rule 11 was satisfied even though the court did not precisely describe the various elements of the crime with which petitioner was charged. And, as previously discussed (*supra*, pp. 11–12), nothing that happened subsequently, prior to or at the time of sentencing casts any doubt upon the fact that the plea was knowingly entered. Petitioner's cooperation with the probation officer showed that he did not want to withdraw his plea. His claim at sentencing that he did not act deliberately was but a way of contritely pleading for a lenient sentence, which the judge ultimately found unjustified by all the circumstances.

In short, petitioner seeks to engraft on Rule 11's generalized mandate a requirement for specificity and detail that neither its drafters nor sound administration of criminal justice requires.

III. A TECHNICAL FAILURE TO COMPLY WITH RULE 11 BEFORE ACCEPTING A GUILTY PLEA DOES NOT JUSTIFY VACATION OF A JUDGMENT OF CONVICTION IF THE PLEA WAS IN FACT VOLUNTARILY ENTERED WITH AN UNDERSTANDING OF THE CHARGE AND OF THE CONSEQUENCES

A. *Failure to comply with Rule 11 does not automatically require vacation of the judgment of conviction.*

Even assuming that the inquiry by the trial judge might have been technically deficient under Rule 11, this would not automatically entitle petitioner to have the judgment of conviction set aside. The ultimate question is not whether the judge, in accepting petitioner's guilty plea, literally complied with Rule 11, but whether in fact the plea was voluntarily and knowingly entered with an understanding of the charge and the consequences. *Cochran* v. *United States*, 365 F. 2d 310 (C.A. 6); see also *Lane* v. *United States*, 373 F. 2d 570 (C.A. 5); *United States* v. *Rizzo*, 362 F. 2d 97 (C.A. 7). As stated in *Turner* v. *United States*, 325 F. 2d 988, 989 (C.A. 8):

> The processes of informing an accused of the nature of the charges against him, of advising him of his right to be prosecuted by indictment, of appraising his consent to be prosecuted in information, and of accepting his plea of guilty as being voluntarily and understandingly made, are matters of reality and not of ritual. * * *

Only the Ninth Circuit, in a case relied upon by petitioner (Pet. Br. 20, 23), has held that a bare finding that the requirements of Rule 11 have not been satisfied at arraignment warrants vacation of a

guilty plea without regard to the actual circumstances. *Heiden* v. *United States*, 353 F. 2d 53 (C.A. 9). That ruling was made in a case where the defendant pleaded guilty without benefit of counsel,[10] so that the result could well be explicable by the particular facts involved. Moreover, the Ninth Circuit itself modified its rigid *Heiden* ruling in *McClure* v. *United States*, 389 F. 2d 279, where a correction of the defect in the Rule 11 procedure at the time of sentencing was held sufficient to deny relief. And in *Castro* v. *United States*, No. 21694 (decided May 28, 1968), the Ninth Circuit declined to give *Heiden* retroactive application.

No other circuit has followed *Heiden;* indeed, four circuits have expressly rejected its rigid approach. *Kennedy* v. *United States*, No. 18473 (C.A. 6, decided June 26, 1968); *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1);[11] *Stephens* v. *United States*,

[10] Similarly, in *Hulsey* v. *United States*, 369 F. 2d 284 (C.A. 5), quoted from at length by petitioner (Pet. Br. 30–32), the defendant was without counsel and flatly contradicted the existence of an essential element of the crime with which he was charged at the time he pleaded guilty (see 369 F. 2d at 286).

[11] Petitioner relies extensively on the *Halliday* decision, as well as on *Fultz* v. *United States*, 365 F. 2d 404 (C.A. 6), and *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9), for the proposition that a duty of inquiry rested upon the trial judge to ascertain whether the guilty plea was voluntarily and knowingly entered (Pet. Br. 20–23). Assuming, however, the existence of such a duty of inquiry, both prior to 1966 and under Rule 11 as amended, the question remains as to the scope of the inquiry required before a judge can properly accept such a plea, and, of more pertinence at this juncture, whether a technical failure to comply with the rule warrants vacation of a judgment of conviction entered on the basis of a guilty plea which,

376 F. 2d 23 (C.A. 10), certiorari denied, 389 U.S. 881; *Brokaw* v. *United States*, 368 F. 2d 508 (C.A. 4), certiorari denied, 386 U.S. 996. Another circuit, which has termed the *Heiden* rule a "novel doctrine," has rejected it in principle. *Rimanich* v. *United States*, 357 F. 2d 537 (C.A. 5); see also *Laughner* v. *United States*, 373 F. 2d 326 (C.A. 5); *Lane* v. *United States*, 373 F. 2d 570 (C.A. 5); *Simon* v. *United States*, 269 F. Supp. 738 (E.D. La.). Other courts of appeals have evidently chosen to ignore *Heiden* when deciding cases raising an alleged failure to observe Rule 11. See *United States* v. *Del Piano*, 386 F. 2d 436 (C.A. 3), certiorari denied, No. 1483 Misc., 1967 Term (June 17, 1968); *United States* v. *Rizzo*, 362 F. 2d 97 (C.A. 7); *Arnold* v. *United States*, 359 F. 2d 425 (C.A. 3); *Bartlett* v. *United States*, 354 F. 2d 745 (C.A. 8), certiorari denied 384 U.S. 945. In sum, the courts of appeals have generally regarded the central issue in cases like the present one to be whether the guilty plea was in fact knowingly and voluntarily entered, rather than whether the trial judge literally complied with Rule 11.

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in view of all the circumstances, was plainly made in a voluntary and knowing manner. It is true that in *Munich* the Ninth Circuit reversed the district court's denial of a motion to vacate and remanded the case to afford the defendant an opportunity to plea anew (337 F. 2d at 361). But that holding simply presaged the Ninth Circuit's adoption of its unnecessarily rigid approach in *Heiden* (see *supra*, pp. 17–18), and was based on the court's conclusion that the non-compliance with Rule 11 there was prejudicial to the defendant. Moreover, in *Munich*, *Halliday* and *Fultz* there was no indication that the trial judge personally addressed any questions to the defendants. In *Fultz* counsel was not appointed until the day the plea was entered, and in *Munich* counsel never stated whether he had advised the defendant regarding his guilty plea.

This approach does not vitiate the significance of Rule 11. It still serves two important purposes (1) by providing the general standards the trial court must follow in accepting a guilty plea (see *supra*, pp. 14–16), and (2) in determining the burden of proof with respect to the voluntary and knowing nature of a guilty plea. The initial burden of showing an inadequate Rule 11 inquiry rests upon the defendant. Once absence of a proper inquiry is established, the burden shifts to the government to show that, realistically, no fundamental error resulted from the trial judge's failure to comply literally with the rule.[12] To the extent that amended Rule 11 requires district courts to make a more extensive inquiry than was required under the former rule, a defendant challenging a guilty plea has an easier task in showing a failure to comply with Rule 11, and the government's burden in opposing such an attack has been correspondingly increased. Nevertheless, if a reviewing court can determine from the record and accompanying papers that the defendant was aware of the consequences of his plea and understood the nature of the charge, and that he voluntarily entered his plea, then no purpose is served by vacating the conviction merely because

[12] The *Heiden* decision was apparently intended by the Ninth Circuit to obviate the necessity of hearings on collateral attacks of guilty pleas by defendants disappointed with their sentences. It has not succeeded in that purpose. Thus, in *Jones* v. *United States*, 384 F. 2d 916 (C.A. 9), a hearing was ordered to consider the defendant's claim that his responses to questions by the trial judge were coerced.

a district court failed to comply completely with all the technical requirements of Rule 11.

In other words, the rule does not require that unless a formalistic ritual was followed, a guilty plea must be thrown out on appeal or collateral attack. Indeed, in *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9), one of the cases cited favorably by the advisory committee which formulated the amendments to Rule 11, and a decision on which petitioner places great reliance—calling it a "leading" and "authoritative" case (Pet. Br. 21)—the court significantly stated (337 F. 2d at 359):

> In determining these questions the court is not required to follow any particular ritual, and it is not necessary that the court personally explain to the defendant the nature of the charge.

B. *If the Court should find that this record does not show that the plea was voluntarily and knowingly entered, the case should be remanded for a hearing on that issue.*

Following imposition of the sentence, petitioner discharged his counsel and retained present counsel. The issues he raised thereafter all related to the procedures followed by the district court incident to accepting his guilty plea. Yet, by failing to file a motion to withdraw his guilty plea under Rule 32(d), F.R. Crim. P., petitioner gave that court no opportunity to consider his allegation that the plea was not voluntarily and knowingly entered. Instead, he immediately appealed to the Seventh Circuit. Apparently, petitioner's position is that the judgment must be vacated if there

was any defect in compliance with Rule 11, regardless of how voluntary and knowing the plea of guilty may in fact have been. In the government's view, the instant record sufficiently shows that the plea was voluntarily entered with an understanding of the charge so that, even if there might have been a technical failure of compliance with Rule 11, the judgment below should nevertheless be affirmed.

We recognize, however, that this Court might conclude that the record does not show either compliance with Rule 11 or that the plea of guilty was voluntarily and knowingly entered. Should this determination be made, it would be appropriate, we submit, for the Court simply to remand the case for a hearing in the district court. Rule 32(d), F.R. Crim. P., provides that after sentencing a plea of guilty may be set aside "to correct manifest injustice." There would be no manifest injustice and no reason to set aside petitioner's guilty plea if the plea was in fact knowingly and voluntarily entered. Hence, if the *Heiden* rule, for which petitioner contends, should be rejected (as all the other circuits have done), the question of the voluntary and knowing nature of the plea becomes a question of fact which must be determined initially by the district court after conducting a hearing. At such a hearing there would be an opportunity to present all the facts relating to whether the plea was in fact voluntary and knowing.

Of course, the accepted and usual way of attacking a plea of guilty is by filing a motion to withdraw the plea under Rule 32(d), or by filing a motion to vacate sentence under 28 U.S.C. 2255. 8 Moore's *Federal*

Practice ¶ 11.04 (2d ed. 1967); 2 Orfield, *Criminal Procedure under the Federal Rules* ¶ 11.49 (1966). Either of these procedural avenues (which for present purposes are virtually synonymous) will normally provide a far better method of presenting the issue to an appellate court than the one followed here, where the reviewing court is in effect asked to pass upon the voluntary and knowing nature of the plea from the transcript of arraignment and sentencing alone.[13] Here, however, petitioner failed to follow either of these courses. Thus, should the Court not accept our view that the record affirmatively shows that petitioner's plea was knowingly and voluntarily entered, the appropriate disposition would be to remand for a hearing in the district court on that issue.[14]

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[13] It should be noted that all the cases cited by petitioner involving Rule 11 arose on collateral attack. *Cerniglia* v. *United States*, 230 F. Supp. 932 (N.D. Ill.); *Fultz* v. *United States*, 385 F. 2d 404 (C.A. 6); *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1); *Heiden* v. *United States*, 353 F. 2d 53 (C.A. 8); *Hulsey* v. *United States*, 369 F. 2d 284 (C.A. 5); *Kadwell* v. *United States*, 315 F. 2d 667 (C.A. 9); *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9); *United States* v. *Davis*, 212 F. 2d 264 (C.A. 7). Our research has failed to disclose any case where a defendant used the process of direct attack by appeal to challenge the voluntariness or knowing nature of his guilty plea.

[14] In addition to relying on Rule 11, petitioner contends that the judgment of conviction against him, on the basis of the guilty plea he entered, violated his rights under the Fifth and Sixth Amendments (Pet. Br. 29–32). What the Sixth Amendment requires, however, is that a criminal defendant "be informed of the nature and cause of the accusation * * *." That requirement applies both to defendants who plead not guilty

CONCLUSION

For the reasons stated, the judgment below should be affirmed. If this Court should conclude otherwise, the cause should be remanded to the district court for a hearing on whether the guilty plea was voluntarily and knowingly entered.

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AUGUST 1968.

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and stand trial and those who, like petitioner, elect to plead guilty. It has always been thought to be satisfied by a properly explicit indictment or information brought against an accused (*e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 557–558), and petitioner cites no authority to the contrary. As to his Fifth Amendment claim, we agree that due process concepts protect against conviction on the basis of a guilty plea entered involuntarily or without an understanding of the charge against an accused. But Rule 11 seeks to go beyond what would strictly be required, as a constitutional matter (*e.g.*, *Sullivan* v. *United States*, 315 F. 2d 304 (C.A. 10), certiorari denied, 375 U.S. 910), and the issues here are whether the requirements of that rule, as amended in 1966, were complied with adequately, and, if not, whether it is nonetheless clear that petitioner's plea was knowingly and voluntarily made. Even should the Court resolve both of these issues against the government, petitioner would only be entitled to a further hearing as to the voluntary and knowing nature of his guilty plea. In short, petitioner's purported reliance on the Fifth and Sixth Amendments adds nothing to the case and works no change in the issues presented.

U.S. GOVERNMENT PRINTING OFFICE: 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF FOR PETITIONER

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INDEX TO REPLY BRIEF

List Of Authorities Cited

Cases:

Other:

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REPLY BRIEF FOR PETITIONER

I.

THE BRIEF FOR THE UNITED STATES AVOIDS THE PRINCIPAL QUESTIONS RAISED IN THIS PROCEEDING.

A. The Petition For Certiorari Presented Questions, Which Were Raised In The Opinion Of The Court Of Appeals, For Review By This Court. The Brief For The United States Has Mis-stated The Questions Presented In This Proceeding And Distorted The Issues In The Case.

Rule 40(d) (2) provides that the phrasing of the Questions Presented need not be identical with that set forth in the Petition for Certiorari. That rule, how-

ever, further provides that the Brief may not raise additional questions nor change the substance of the questions already presented. In the Brief For The United States the Respondent has totally disregarded the Questions Presented for review by the Petition for Certiorari, (Petn. 3), and the Opinion of the Court of Appeals for the Seventh Circuit (App. 19-20). The Questions presented were never changed through the course of the seven briefs prior to the Respondent's Brief. The Court of Appeals even recited the questions as presented to it. We note additionally that no objection to the presentation of questions before this Court was raised in the Memorandum For The United States In Opposition to the Petition for Certiorari.

The first Question Presented by the Petitioner is as follows:

> "Whether the *total absence* of any questioning of Petitioner by the District Court prior to sentencing as to Petitioner's understanding of the nature of the charges against him is a compliance with Rule 11 of the Federal Rules of Criminal Procedure." (P. Br. 2) (Italics ours).

In the Brief For The United States the Respondent has changed not only the phrasing of the question, but also its substance. The statement of the question presented in the Brief For The United States is as follows:

> "Whether the record shows that petitioner's plea of guilty was entered voluntarily, with knowledge of the nature of the charge and the consequences of the plea, and contains sufficient assurances that a factual basis existed for the guilty plea." (U. S. Br. 2)

This is a misrepresentation, and it is not the only misrepresentation in the Brief For The United States. It sets a framework for those that follow.

The paramount duty of a prosecutor is accuracy and truth. The record shows a *complete absence* of questioning of Petitioner as to the nature of the accusation. The Respondent recognized in its Memorandum (in opposition to Petition for Certiorari) at page 3 that no questions were asked of Petitioner as to his understanding of the crime charged. Now the Government has changed the substance of the issue before the Court. The Government should answer the *questions fairly presented.* The Government should martial its arguments in answer to *arguments actually made.* Instead the Government has avoided the issues arising from the facts of *this case.* Such procedures are unfair to the Petitioner and do a genuine disservice to the principles underlying our system of judicial review.

The new statement of the issue by the Respondent totally distorts the first question actually presented in this proceeding. Additionally, the Respondent has improperly interpreted the issue and the argument of Petitioner on this matter. At page 14 of the Brief For The United States is the following passage:

> "*It is claimed,* however, that before accepting the plea, the Trial Judge did not *sufficiently* inquire into the Petitioner's understanding of the nature of the charge against him. Undoubtedly the Judge *could have been more explicit* in this respect". (Italics ours).

Such a statement is a complete and patent misrepresentation. The *claim* of the Petitioner, and the *fact* disclosed by the record, is that the Trial Judge *did not inquire* into the Petitioner's personal understanding of the charge, *at any time, in any way.* (P. Br. 12, 14, 17, 19, 23, 34.)

The Brief For The United States does not contain the second Question Presented in the Petition for Writ of Certiorari, the Opinion of the Court of Appeals, and the Brief for the Petitioner. That question is as follows:

> "Whether the District Court abused its discretion by entering a judgment of conviction after it knew or should have known that Petitioner did not understand the nature of the charge". (P. Br. 2).

The Government Brief is silent as to the presentation of that question which was briefed and argued, orally and in writing, in the Court of Appeals. The question was put in the same form in the Petition For A Writ Of Certiorari, and was not disputed by the Memorandum For The United States In Opposition. Note should also be made that the Respondent has argued vigorously in its brief that Amended Rule 11 "preserves" a "desirable degree" of *discretion* for the trial judge (U. S. Br. 14). In view of this position, the Respondent's failure to direct its attention to the question as raised by Petitioner and to answer the arguments of Petitioner is clearly non-responsive and apparently intentional.

The Government Brief also fails to recognize the third Question Presented which is founded upon the Fifth and Sixth Amendments to the Constitution. That question is absent from the Government's Brief and the only reference in that Brief to the United States Constitution is in footnote 13 (U. S. Br. 23-24).

The Respondent's failure to recognize The Questions Presented and to discuss them raises a substantial question whether the Respondent has met the grounds of this proceeding or has abandoned its opposition to the arguments of the Petitioner on those questions.

B. The Brief For The United States Has Volunteered A New Question In Violation Of The Rules Of This Court.

In addition to mis-stating the Questions Presented, the Respondent has manufactured a new question which it has denominated as Question 3 (U. S. Br. 2). For the first time since the Appellate proceedings began in this case, the Government has raised a question as to whether the case should be *remanded* to determine whether the guilty plea was voluntarily and knowingly entered. Raising such a question for the first time before this Court is not an acceptable procedure. In similar situations this Court has clearly indicated that it will uphold Rule 40(1)(d)(2) of the Rules of this Court and will consider only the questions decided below and brought before the Court through Appellate proceedings or by Petition for Writ of Certiorari. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

C. The Brief Of The United States Has Mis-stated The Facts Shown In The Record And Has Made Totally Unwarranted Inferences From The Record.

Throughout the Brief For The United States references to the record before this Court are misleading, when they are present, and are totally wanting in most cases.

In the Summary of Argument (U. S. Br. 6) the Respondent makes the following statement:

> "From the time of indictment petitioner was represented by able and experienced counsel who engaged in *numerous conferences* with petitioner apparently over the issue of wilfulness since his tax liability was never publicly disputed." (Italics ours).

No reference to the record is made at this point nor at any point in the Argument, nor at any time in the Brief, to support such a statement. The simple fact is that *the record does not disclose that any conferences were held;* nor does the record indicate that the element of wilfulness was ever mentioned to the Petitioner. The thrust of the Argument in the Brief For Petitioner is that the record, far from disclosing any discussion of wilfulness, actually raises grave doubts as to whether or not the elements of the crime were correctly interpreted in the statement of counsel for the Petitioner in the District Court.

It must be expected that Petitioner and Respondent will interpret the record differently. Certain statements of Respondent and the record bases for such statements, however, cannot go unnoticed, such as the following:

> "While he [defense counsel] phrased it to the Court in terms of the neglect being so gross as to become criminal (App. 14) he had *obviously* concluded that a defense of lack of wilfulness could not be sustained and had so *advised* his client." (Italics ours). (U. S. Br. 10)

The Government's reference to the Appendix does contain a statement by counsel as to neglect. The inference drawn from that statement of counsel is totally unwarranted. The record reference is as follows (App. 14):

> "Mr. Sokol: *He did not act in contemplation of avoiding taxation.* That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please.
>
> I could not have, in good conscience, recommended that he go into a plea *if I did not feel that neglect has become criminal* when it reaches a certain stage.

> But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—"

How can the Government possibly construe that statement of counsel, which is evidently the record reference used to support its conclusion, to exhibit an *obvious* conclusion that counsel had *advised* his client on the issue of wilfulness? Surely there is nothing in that statement to support such a conclusion. The best that can be said of the foregoing statement of counsel is that it raises many more questions than it answers.

It is significant to note at this point that the Government has failed to recognize and answer the Argument made by the Petitioner that the District Court, when faced as it was with an incorrect statement of the elements of the crime under section 7201, had an *affirmative duty to inquire further*. The District Court did not inquire further and such failure is an abuse of discretion.

Another patent example of the Government's cavalier attitude towards accurate reference to the record is as follows:

> "The question whether petitioner would plead guilty had *obviously* been under *discussion* for some time for, on June 29, more than two weeks before he entered his plea *government counsel* indicated that a trial might not be necessary. Since petitioner's tax liability was never publicly disputed any discussions with respect to a plea between petitioner and his attorney necessarily related primarily to the element of *wilfulness*, which would have presented the *only real issue at the trial.*" (Italics ours). (U. S. Br. 9-10).

The Government does not cite any record reference for these conclusions. The only clue to the place in the record where the Respondent might claim justification for this statement is the reference to Government Counsel and the necessity for a trial. The colloquy at which Government counsel spoke about a trial is as follows:

> "Mr. Galbraith: Good morning, your Honor. This is the matter that I discussed with you the other day and it arises out of the defendant's illness. This is an income tax case.
> "The Court: How long will the trial take?
> "Mr. Galbraith: Well, it is anticipated the matter will not go to trial, according to counsel.
> "The Court: When is it set for?
> "Mr. Galbraith: It is presently set for tomorrow. We are asking it to be set July 15th.
> "The Court: That will be the order." (App. 5)

Furthermore the fact that *Government Counsel* informed the Court of *Petitioner's illness,* and the additional fact that defense counsel was not even present, raise a number of unanswered questions which the Respondent has carefully avoided.

The Respondent's admission that wilfulness would present the only real issue at the trial reinforces the argument made by the Petitioner as to the affirmative duty of the Court to inquire on that subject. But the inference drawn by the Government that discussions had taken place on the issue of wilfulness is an extreme assumption which can find no basis in the record.

II.

THE BRIEF FOR THE UNITED STATES HAS MISINTERPRETED THE APPLICABLE RULE.

A. Rule 11 Is Mandatory.

The Brief For The United States, in speaking of Rule 11, states:

> "It *simply directs* the Judge to address the Defendant personally and determine the voluntary and knowing nature of his guilty plea before accepting it." (Italics ours). (U. S. Br. 14)

Subsequently the Respondent speaks of the "general requirements" (U. S. Br. 15), "generalized mandate" (U. S. Br. 16) and "general standards" (U. S. Br. 20). The Respondent's implication is that Rule 11 is really advisory in nature. Such a characterization of Rule 11 of the Federal Rules of Criminal Procedure, is simply incorrect. Numerous cases have specifically held for many years that Rule 11 is *mandatory*. The controlling case in the Seventh Circuit is *United States* v. *Davis*, 212 F. 2d 264 (C.A. 7, 1954) where the Court, referring to Rule 11, said at page 267:

> "This Rule is stated in *mandatory* language and the court is not relieved of the *duty* which it imposes solely because the accused, as here, is represented by counsel of his choice. The rule is simply and concisely stated, and it makes no such exception." (Italics ours)

The Government Brief cites as authority for the proposition that Rule 11 is *directory only*, and that Rule 11 preserves a desirable degree of flexibility and discretion for trial Judges, the *Lowe* case. (U. S. Br. 14-15). However, the Brief For The United States, which abounds in footnotes, has failed to attend to the single footnote in that case which reads as follows:

"Rule 11, Fed. R. Crim. P., as amended February 28, 1966, and effective July 1, 1966, now contains the *express requirement* that the court *address the defendant personally* in determining that the plea is made voluntarily with *understanding* of the nature of the charge. The Advisory Committee's Note to the amended rule makes clear that personal interrogation of the defendant on this matter by the court is now *required*, even though he is represented by counsel, and counsel or the government attorney has attempted to explain the nature of the charge and the consequences of the plea." *United States* v. *Lowe*, 367 F. 2d 44, 45 (1966) (Italics ours).

The wording of Rule 11 is plain and concise. The rule states that the Court "*shall not accept*" a plea of guilty, and further states that the Court "*shall not enter judgment* upon a plea of guilty." (App. 31). This language is mandatory and any attempt to characterize it as anything less should be disregarded.

B. The Burden Of Proof Is On The Respondent And That Burden Has Not Been Met.

The authorities are clear and unanimous on the question of the ultimate burden of proof. The Government has the burden of proof on the question of whether or not the plea was made voluntarily and knowingly. *Lane* v. *United Sates*, 373 F. 2d 570, 573 (C.A. 5, 1967). The Respondent changes that burden in its brief. The Government admits that it has the burden, but defines that burden as a showing that ". . . no *fundamental error* resulted from the trial judge's failure to comply literally with the rule." (U. S. Br. 20). (Italics ours)

Even if we assume for the sake of argument that the Respondent's definition of its burden is accurate, sev-

eral questions remain. Does the Government admit that error was committed in the failure of the District Court to comply with the terms of Rule 11? (In its Memorandum, at page 3, the Respondent recognized that the Court had not expressly questioned Petitioner as to his understanding of the charge.) Why doesn't the Respondent then go on to show that no fundamental error resulted?

The answers to these questions are simple. There was a *failure to comply* with Rule 11, and *fundamental error did result.* Petitioner is faced with a jail term and a fine, but there is nothing in the record to show that he understood, or was informed of the charge. This kind of error is indeed fundamental.

C. The Alternative Methods Suggested By The Respondent Exemplify The Constitutional Position And Arguments Of The Petitioner.

The alternatives faced by Petitioner, and others similarly situated, are rather narrow. The Government suggests that a motion to vacate sentence under 28 U.S.C. 2255 is an "accepted and usual" method of questioning a conviction based on a guilty plea. (U. S. Br. 22). The Government cites in support of this contention *8 Moore's Federal Practice* Par. 11.04. That authority points out the serious difficulty in a motion to vacate. As Professor Moore puts it: "The statute requires that defendant requesting relief be *in custody* under the challenged sentence." (*ibid.*) (Italics ours)

The second suggestion of the Government is the other "accepted and usual" approach, namely, a motion to withdraw a guilty plea under Rule 32 (d) (U. S. Br. 22). If such a motion is made after sentence is imposed,

as in the present case, an extremely heavy burden is placed on the Defendant. In the same paragraph cited above, and used by the Government as authority, Professor Moore says: "As a practical matter the scope of relief under Rule 32 (d) is narrow since *defendant must ordinarily demonstrate his innocence* of the charge in order to withdraw the plea." (*ibid.*) (Italics ours).

Thus the two alternatives for a Defendant, in the situation faced by Petitioner, are:

1) go to jail and move to vacate the sentence;
2) Move to withdraw the plea and assume the burden of proving innocence.

In either of these situations, Petitioner would be seriously prejudiced as a direct result of the error in the District Court. If the burden were changed, as Professor Moore suggests, so that in order to present a motion to withdraw his plea Petitioner had to demonstrate his *innocence*, then the Fifth Amendment rights of Petitioner are meaningless. On the other hand, in order to retain the presumption of innocence on his behalf, Petitioner would have been forced to submit to imprisonment before he could raise any question as to his rights under the Sixth Amendment by way of a motion to vacate sentence.

It is therefore clear that a failure to comply with Rule 11 is a serious Constitutional violation. In spite of this, Respondent has failed to recognize or to argue the Question Presented on this issue. Any order other than a reversal of the conviction will put Petitioner back into the dilemma suggested above.

D. Even Before The Amendment To Rule 11, The Burden On The Government Was Clearly Defined And Understood.

In its Brief, the Respondent cites authorities to support the proposition that the test under Rule 11 is whether in fact the plea was voluntary and knowing with an understanding of the charge and the consequences. In fact, the Respondent quotes a paragraph from *Turner v. United States,* 325 F. 2d 988 (C.A. 8, 1964) to that effect (U. S. Br. 17). Significantly, the *Turner* case, and the other authorities used by the Respondent, deal with Rule 11 prior to its amendment. More significant, however, is the paragraph immediately following that quoted by the Respondent. The *Turner* Court went on to define the Government's burden as follows:

> "The Court has a responsibility, of course, to be certain that the reality of voluntariness and understanding exists, but there is no requirement that it must enter a formal finding or recitation to this effect. *Adkins* v. *United States,* supra. The record of the proceedings must indicate with *absolute certainty* that the accused was in a position so to act, and also it must leave *no possible room for doubt* that the Court evaluated and was satisfied that the accused was so acting at the time." *Turner* v. *United States,* 325 F. 2d 988, 990 (C.A. 8, 1964) (Italics ours).

Thus, even before the 1966 Amendment, the dimensions of the burden of the Government had been surveyed and defined. The 1966 Amendment did not reduce that burden, by the Government's own admission, but increased it (cf., U. S. Br. 20). In this case, and with the record made in the District Court, the Government cannot satisfy its burden even as defined in the case which it has cited in its Brief.

CONCLUSION.

With all due deference, and because of the premises, it is respectfully submitted that the judgment be reversed and the cause remanded for further proceedings conformably to law.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 43.—October Term, 1968.

William J. McCarthy, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 2, 1969.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This case involves the procedure that must be followed under Rule 11 of the Federal Rules of Criminal Procedure before a United States District Court may accept a guilty plea and the remedy for a failure to follow that procedure.

On April 1, 1966, petitioner was indicted on three counts in the United States District Court for the Northern District of Illinois for violating § 7201 of the Internal Revenue Code. He was charged with "willfully and knowingly" attempting to evade tax payments of $928.74 for 1959 (count 1), $5,143.70 for 1960 (count 2), and $1,207.12 for 1961 (count 3). At his arraignment two weeks later, petitioner, who was represented by retained counsel, pleaded not guilty to each count. The court scheduled his trial for June 30; but on June 29, it granted the Government's motion to postpone the trial because of petitioner's illness. The trial was rescheduled for July 15.

On that day, after informing the court that he had "advised . . . [petitioner] of the consequences of a plea," defense counsel moved to withdraw petitioner's plea of not guilty to count 2 and to enter a plea of guilty to that count. The district judge asked petitioner if he desired to plead guilty and if he understood that such a

plea waived his right to a jury trial and subjected him to imprisonment for as long as five years and to a fine as high as $10,000. Petitioner stated that he understood these consequences and wanted to plead guilty. The Government consented to this plea change and informed the court that if petitioner's plea of guilty to count 2 were accepted, the Government would dismiss counts 1 and 3. Before the plea was accepted, however, the prosecutor asked the judge to inquire whether it had been induced by any threats or promises. In response to the judge's inquiry, petitioner replied that his plea was not the product of either. He stated that it was entered of his "own volition." The court ordered a presentence investigation and continued the case to September 14, 1966.[1]

At the commencement of the sentencing hearing on September 14, petitioner asserted that his failure to pay taxes was "not deliberate" and that they would have been paid if he had not been in poor health. The prosecutor stated that the "prime consideration" for the Government's agreement to dismiss counts 1 and 3 was petitioner's promise to pay all taxes, penalties, and interest. The prosecutor then requested the court to refer expressly to this agreement. After noting that petitioner possessed sufficient attachable assets to meet these obligations, the court imposed a sentence of one year and a fine of $2,500. Petitioner's counsel immediately moved to suspend the sentence. He emphasized that petitioner, who was then 65 years of age, was in poor health and contended that his failure to pay his taxes had resulted from his "neglectful" and "inadvertent" method of bookkeeping during a period when he had been suffering from a very serious drinking prob-

[1] The relevant portion of the colloquy at this hearing is quoted in Appendix A.

lem. Consequently, asserted petitioner's counsel, "there was never any disposition to deprive the United States of its due." The judge, however, after indicating he had examined the presentence report, stated his opinion that "the manner in which [petitioner's] books were kept was not inadvertent." He declined, therefore, to suspend petitioner's sentence.[2]

On appeal to the Unted States Court of Appeals for the Seventh Circuit, petitioner argued that his plea should be set aside because it had been accepted in violation of Rule 11 of the Federal Rules of Criminal Procedure. Specifically, petitioner contended that the District Court had accepted his plea (1) "without first addressing [him] . . . personally and determining that the plea [was] . . . made voluntarily with understanding of the nature of the charge . . . ,"[3] and (2) that the court had entered judgment without determining "that there [was] . . . a factual basis for the plea."[4] In affirming petitioner's conviction,[5] the Court of Appeals

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[2] Defense counsel's account of petitioner's personal problems during the period he allegedly evaded his income taxes is quoted in Appendix B.

[3] Fed. Rules Crim. Proc. 11.

[4] *Ibid.* Both of these provisions were added by the 1966 amendment to Rule 11. The amendment became effective on July 15, 1966. It is italicized in the following quotation of the Rule:

"A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea *or a plea of nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea*. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*"

[5] 387 F. 2d 838 (C. A. 7th Cir. 1968).

held that the District Judge had complied with Rule 11. The court implied that the Rule did not *require* the District Judge to address petitioner personally to determine if he understood the nature of the charge. The court also concluded that the colloquy at the sentencing hearing demonstrated that the judge had satisfied himself by an examination of the presentence report that the plea had a factual basis.[6]

Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts,[7] and because of a conflict in the courts of appeals over the effect of a district court's failure to follow the provisions of the Rule,[8] we granted certiorari. 390 U. S. 1038 (1968). We agree with petitioner that the District Judge did not comply with Rule 11 in this case; and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal.

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[6] The Advisory Committee suggests three methods of determining that a factual basis exists for a guilty plea: (1) inquiring of the defendant; (2) inquiring of the prosecutor; (3) examining the presentence report. Fed. Rules Crim. Proc. 11, Notes of Advisory Committee on Criminal Rules.

[7] During 1968 approximately 82% (22,055 out of 26,862) of all verdicts obtained in the United States district courts were pursuant to a plea of guilty or its substantial equivalent, a plea of *nolo contendere*. 1968 Director of the Administrative Office of the United States Courts Ann. Rep. 261.

[8] See nn. 22 and 23, *infra*.

I.

Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea. At oral argument, however, counsel for the Government repeatedly conceded that the judge did not personally inquire whether petitioner understood the nature of the charge. At one point, counsel stated quite explicitly: "The subject on which he [the District Judge] did not directly address the defendant, which is raised here, is the question of the defendant's understanding of the charge." Nevertheless, the Government argues that since petitioner stated his desire to plead guilty, and since he was informed of the consequences of his plea, the District Court "could properly *assume* that petitioner was entering that plea with a complete understanding of the charge against him."[9] (Emphasis added.)

We cannot acept this argument, which completely ignores the two purposes of Rule 11 and the reasons for its recent amendment. First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated,[10] it is designed to assist the district

[9] The Government agrees with the Court of Appeals that the record of the September 14 sentencing hearing demonstrates that the district judge satisfied himself by examining the presentence report that there was a factual basis for the plea. However, because of the Government's concession at oral argument that the judge did not inquire whether petitioner understood the nature of the charge, and because of our holding that any noncompliance with Rule 11 is reversible error, we need not consider the Government's contention that the record adequately supports the Court of Appeals' conclusion that the district judge satisfied himself that there was a factual basis for the plea.

[10] See *Waddy* v. *Herr*, 383 F. 2d 789 (1967).

judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary.[11] Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.[12]

Prior to the 1966 amendment, however, not all district judges personally interrogated defendants before accepting their guilty pleas.[13] With an awareness of the confusion over the Rule's requirements in this respect, the draftsmen amended it to add a provision "expressly requiring the court to address the defendant personally."[14] This clarification of the judge's responsibilities quite obviously furthers both of the Rule's purposes. By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's

[11] See, *e. g.*, *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962); *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948); *Waley* v. *Johnson*, 316 U. S. 101 (1942).

[12] See *Stephens* v. *United States*, 376 F. 2d 23 (C. A. 10th Cir.), cert. denied, 389 U. S. 881 (1967); *Rimanich* v. *United States*, 357 F. 2d 537 (C. A. 5th Cir. 1966); *Kadwell* v. *United States*, 315 F. 2d 667, 669 n. 6 (C. A. 9th Cir. 1963); Orfield, Pleas in Federal Criminal Procedure, 35 Notre Dame Law. 1, 31–32 (1959).

Chief Judge Walter E. Hoffman of the United States District Court for the Eastern District of Virginia has stated that "[t]he multitude of questions presented by the arraignment and plea under Rules 10 and 11 furnish the most frequent basis for attack in the popular post-conviction remedy available to federal prisoners." Hoffman, What next in Federal Criminal Rules? 21 Wash. & Lee L. Rev. 1, 8 (1964).

[13] See Fed. Rules Crim. Proc. 11, Notes of Advisory Committee on Criminal Rules.

[14] *Ibid.*

voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack.

These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.[15] For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.[16] Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.[17]

Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense

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[15] See J. Orfield, Criminal Procedure Under the Federal Rules § 11:12 (1966); A. Enker, Perspectives on Plea Bargaining, President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts, Appendix A, 116 (1967); Note, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 865, 871–872 (1964).

[16] See n. 11, *supra*.

[17] See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 23 (1966); ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty § 1.4 (a), commentary (Tent. Draft 1967).

charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty."[18] Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."[19]

To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge.[20]

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[18] Fed. Rule Crim. Proc. 11, Notes of Advisory Committee on Criminal Rules.

[19] *Ibid.*

[20] The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other than those expressed in the Rule itself. As our discussion of the facts in this particular case suggests, however, where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. In all such inquiries, "[m]atters of reality, and not mere ritual, should be controlling." *Kennedy* v. *United States*, 397 F. 2d 16, 17 (C. A. 6th Cir. 1968).

II.

Having decided that the Rule has not been complied with, we must also determine the effect of that noncompliance, an issue that has engendered a sharp difference of opinion among the courts of appeals. In *Heiden* v. *United States*, 353 F. 2d 53 (1965), the Court of Appeals for the Ninth Circuit held that when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew.[21] Other courts of appeals, however, have consistently rejected this holding, either expressly[22] or tacitly.[23] Instead, they have adopted the approach urged by the Government, which is to place upon the Government the burden of demonstrating from the record of the Rule 11 hearing that the guilty plea was voluntarily entered with an understanding of the charge. See, *e. g.*, *Halliday* v. *United States*, 380 F. 2d 270

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[21] After two separate panels had applied *Heiden* retroactively without discussion in *Geter* v. *United States*, 353 F. 2d 208 (1965), and *Freeman* v. *United States*, 350 F. 2d 940, 943 (1965), in a subsequent *en banc* decision the Ninth Circuit held that it would not apply *Heiden* to cases in which the guilty plea was accepted before the date on which *Heiden* was decided. *Castro* v. *United States*, 396 F. 2d 345 (C. A. 9th Cir. 1968).

[22] *Kennedy* v. *United States*, 397 F. 2d 16 (C. A. 6th Cir. 1968); *Halliday* v. *United States*, 380 F. 2d 270 (C. A. 1st Cir. 1967) ("at least with respect to [pre-amended] Rule 11"); *Stephens* v. *United States*, 376 F. 2d 23 (C. A. 10th Cir.), cert. denied, 389 U. S. 881 (1967); *Brokaw* v. *United States*, 368 F. 2d 508 (C. A. 4th Cir. 1966), cert. denied, 386 U. S. 996 (1967) (at least where the defendant raises only the factual issues of voluntariness).

[23] *United States* v. *Del Piano*, 386 F. 2d 436 (C. A. 3d Cir. 1967), cert. denied, 392 U. S. 936 (1968); *Lane* v. *United States*, 373 F. 2d 570 (C. A. 5th Cir. 1967); *United States* v. *Kincaid*, 362 F. 2d 939 (C. A. 7th Cir. 1966); *Bartlett* v. *United States*, 354 F. 2d 745 (C. A. 8th Cir. 1966).

(C. A. 1st Cir. 1967); *Lane* v. *United States*, 373 F. 2d 570 (C. A. 5th Cir. 1967).[24] In these circuits, if voluntariness cannot be determined from the record, the case is remanded for an evidentiary hearing on that issue. See, *e. g.*, *Kennedy* v. *United States*, 397 F. 2d 16 (C. A. 6th Cir. 1968); *Halliday* v. *United States*, *supra*.

We are persuaded that the Court of Appeals for the Ninth Circuit has adopted the better rule. From the defendant's perspective, the efficacy of shifting the burden of proof to the Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This prima facie case for voluntariness is likely to be treated as irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing.

Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." *Heiden* v. *United States*, *supra*, at 55. The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset . . . ." *Ibid.* As the Court of Appeals for the Sixth Circuit explained in discussing what it termed the "persuasive rationale" of *Heiden*: "When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the

[24] See 8 J. Moore, Federal Practice ¶ 11.03 [1], at 11–22 (2d ed. 1968). But see *United States* v. *Pate*, 357 F. 2d 911 (C. A. 7th Cir. 1966).

resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided . . . ." *Waddy* v. *Herr*, 383 F. 2d 789, 794 (1967). There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him.

The wisdom of Rule 11's requirements and the difficulty of achieving its purposes through a post-conviction voluntariness hearing are particularly apparent in this case. Petitioner, who was 65 years old and in poor health at the time he entered his plea, had been suffering from a serious drinking problem during the time he allegedly evaded his taxes. He pleaded guilty to a crime that requires a "knowing and willful" attempt to defraud the Government of its tax money;[25] yet, throughout his sentencing hearing, he and his counsel insisted that his acts were merely "neglectful," "inadvertent," and committed without "any disposition of depriving the United States of its due." Remarks of this nature cast considerable doubt on the Government's assertion that petitioner pleaded guilty with "full awareness of the nature of the charge." Nevertheless, confronted with petitioner's statement that he entered his plea of his "own volition," his counsel's statement that he explained the nature of the charges, and evidence that petitioner did owe the Government back taxes, both the District Court and the Court of Appeals concluded that petitioner's guilty plea was voluntary.

Despite petitioner's inability to convince the courts below that he did not fully understand the charge against him, it is certainly conceivable that he may have intended to acknowledge only that he in fact owed the Government the money it claimed without necessarily admitting that he committed the crime charged; for that crime requires the very type of specific intent that

[25] *Sansone* v. *United States*, 380 U. S. 343 (1965).

he repeatedly disavowed. See *Sansone* v. *United States*, 380 U. S. 343 (1965). Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors.[20]

On the other hand, had the District Court scrupulously complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's own replies to the court's inquiries might well have attested to his understanding of the essential elements of the crime charged, including the requirement of specific intent, and to his knowledge of the acts which formed the basis for the charge. Otherwise, it would be apparent to the court that the plea could not be accepted. Similarly, it follows that, if the record had been developed properly, and if it demonstrated that petitioner entered his plea freely and intelligently, his subsequent references to neglect and inadvertence could have been summarily dismissed as nothing more than overzealous supplications for leniency.

We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not

[20] Willfully filing a fraudulent or false return is a misdemeanor under § 7207 of the Internal Revenue Code, and willfully failing to pay taxes is a misdemeanor under § 7203 of the Code. The close interrelationship between these two offenses and the felony for which petitioner was convicted under § 7201 is explained in detail in *Sansone*.

only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

We therefore reverse the judgment of the Court of Appeals for the Seventh Circuit and remand the case for proceedings consistent with this opinion.

It is so ordered.

APPENDIX A.

The relevant portion of the colloquy at the Rule 11 hearing on July 15 is as follows:

"[Mr. Sokol (petitioner's counsel)]: If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

"The Court: Is that satisfactory to the government?

"Mr. Hughes [Government counsel]: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

"The Court: There will be a disposition in regard to the other Count?

"Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

"The Court: Not until the plea is accepted and there is a judgment thereon.

"Mr. Hughes: Correct.

"The Court: This is tax evasion, five and ten?

"Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

"The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand on your plea of

guilty you may be incarcerated for a term not to exceed five years?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand you may be fined in an amount not in excess of $10,000?

"Defendant McCarthy: Yes, your Honor.

"The Court: Knowing all that, you still persist in your plea of guilty?

"Defendant McCarthy: Yes, your Honor.

"The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

"Now, in regard to Counts 1 and 3?

"Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

"Mr. Sokol: No, no promises or threats.

"The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

"Defendant McCarthy: No, your Honor.

"The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

"Defendant McCarthy: I beg your pardon?

"The Court: Has anybody threatened you to enter a plea of guilty?

"Defendant McCarthy: That's right, of my own volition, your Honor.

"The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand."

APPENDIX B.

The colloquy at the September 14 sentencing hearing included the following:

"Mr. Sokol [petitioner's counsel]: . . . If the Court please, apart from the wrecking of his physical health that has attended a number of the problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs no deterrent. I cannot imagine a man—apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

"When I spoke with Mr. Sanculius [the probation officer], I knew that we had given to him some reference to the fact and some attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

"With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

"The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

. . . . . .

"Mr. Sokol: . . . When am an is neglectful and adopts a kind of a devious way of secreting him-

self from the government, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this—he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

"There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that time he had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks. His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, 'You have to put yourself under the jurisdiction of your brother,' and there was some indication that he was supposed to deposit this and he would not have disposition over his own assets. They did not feel that he could look out for himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps guess without going into Freudian terms he was oppressed, and in order to free himself—and this had nothing to do with the government—in order to free himself from what he felt was a trap situation where he, at the age of sixty-two or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

"He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has—and it is like a little boy—if he has the consequence lying before him he says, 'Oh, yes.'

. . . . . .

"Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please.

"I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

"The Court: It took place over a series of four years, didn't it, Counsel?

"Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

"The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

"Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accomplie."

SUPREME COURT OF THE UNITED STATES

No. 43.—October Term, 1968.

William J. McCarthy, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 2, 1969.]

Mr. Justice Black, concurring.

I concur, though not without some doubt, in the reversal of the judgment of conviction in this case. Rule 11 of the Federal Rules of Criminal Procedure requires that the trial judge personally address a defendant who pleads guilty in order to ascertain if he understands the nature of the crime of which he has pleaded guilty. In this case the trial judge did not personally address the defendant but seems to have accepted the statement of the defendant's lawyer that he had advised the petitioner of the consequences of a plea of guilty. I do not base my concurrence in the judgment upon any "supervisory power" of this Court, however, but exclusively on the failure of the judge to first address the defendant personally, as required by Rule 11.